Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 359.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF TEXAS, DEFENDANT IN ERROR.

MOTION TO DISMISS OR TO AFFIRM.

And now comes the State of Texas, defendant in error in the above entitled and numbered cause, and moves this court to dismiss the writ of error sued out from this court to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, for the reason that there is no substantial Federal question involved in this controversy as is apparent from the record and proceedings in this case.

Second.—In the event said motion to dismiss is overruled, then the State of Texas, defendant in error, respectfully moves this court to affirm the decision of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, because it is apparent from the record that if there is the color of a Federal question in the case it is wholly frivolous and without merit.

BRIEF OF ARGUMENT.

As is apparent from the record in this cause, the plaintiff in error was prosecuted by the State of Texas for violations of the anti-trust laws of the State of Texas, there being two separate and distinct acts of the Legislature upon which such prosecution was based, one being known as the Act of 1899 and the other the Act of 1903. The plaintiff in error is a Missouri corporation and received a permit to do business in the State of Texas for a period of ten years from the 31st day of May, 1900, to the 31st day of May, 1910.

Such portions of the Acts of 1899 and 1903 as are necessary to be considered are as follows:

Sections 1, 2, 5 and 7 of the Act of 1899:

"Section 1. Any corporation organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this State, or any partnership, or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided by this act.

"Sec. 2. A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill, or acts, or of any other valuable thing or possession, by or between persons, firms or corporations, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a 'monopoly,' as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incor-

porated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this act, if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly,' as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or associations of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

"Sec. 5. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the panalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.

"Sec. 7. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this act, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in the State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other State or country, which shall violate any of the provisions of the preceding sections of this act shall thereby forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in the State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to

have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State, has been, while acting as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act, shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, to the Commissioner of Insurance, Statistics and History of the State, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation."

Sections 1, 2, 3, 8, 11 and 17 of the Act of 1903:

"Section 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes:

"1. To create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for maket or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for

transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

"7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.

"Sec. 2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"Sec. 3. That either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations, or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

"Sec. 8. Every foreign corporation violating any of the provisions of this act is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the State of Texas.

"Sec. 11. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this act shall be over and above the fees allowed him under the general fee bill.

"Sec. 17. That all laws and parts of laws in conflict with this act, be and the same are hereby repealed, and that Title CVIII of the Revised Civil Statutes of the State of Texas of 1895, and Articles 5313, 5314, 5315, 5316, 5317, 5318, 5319, 5320, 5321 and 5321a, thereof, be and the same are hereby expressly repealed; and that Articles 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 988a, 988b, 988c, 988d of Chapter 7, in Title XVIII, of the Penal Code of the State of Texas of 1895, be and the same are hereby expressly repealed; and that an act entitled 'An Act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and promote free competition in the State of Texas,

and to repeal all laws and parts of laws in conflict with this act,' approved April 30, 1895, and known and published as Chapter 83 of the General Laws of the Twenty-fourth Legislature, be and the same is hereby expressly repealed; and that an act entitled 'An Act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles, to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act and to authorize the institution and prosecution of suits therefor,' approved May 25, 1899, and published and known as Chapter CXLVI of the General Laws of the Twenty-sixth Legislature, be and the same are hereby expressly repealed; and that an act entitled 'An Act to amend Article 5318, Title 108, of the Revised Civil Statutes, of the State of Texas, prescribing penalties against trusts and conspiracies against trade,' approved June 5, 1899, and known as Chapter CLXXII of the General Laws of the Twenty-sixth Legislature, be and the same is hereby expressly repealed; provided nothing in this act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this act takes effect."

As is apparent from the opinion of the Court of Civil Appeals, which sets out in full the charge of the trial court, the issues involved in the State court were whether or not the Waters-Pierce Oil Company had violated the first and second sections of the Act of 1899, and the first; second and third sections of the Act of 1903. In other words, the questions submitted to the jury were:

First.—Whether or not the Waters-Pierce Oil Company entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined from petroleum, and whether or not said company remained or continued to be a party to said agreement or understanding, if there was any such agreement or understanding, during any portion of the time from June 1, 1900, to March 31, 1903.

Second.—Whether or not the Waters-Pierce Oil Company had brought about or permitted any combination or union of its capital with that of the Standard Oil Company of New Jersey whereby the price in Texas of oil refined from petroleum other than oil which was the subject of interstate as distinguished from local

commerce was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or regulated.

Third.—Whether or not the Waters-Pierce Oil Company entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in said State of the business of selling oil refined from petroleum other than oil which was the subject of interstate as distinguished from local commerce, or to fix, maintain or increase the price of such oil in Texas or to prevent or lessen competition in Texas in the sale of such oil, and that the plaintiff in error remained or was a party to and acted under such combination, if any such there was, on any date subsequent to March 31, 1903, and prior to April 29, 1907.

Fourth.—Whether or not the direction of the affairs of the Waters-Pierce Oil Company and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or any date subsequent thereto and prior to April 29, 1907, and whether or not they were placed under such common management and control, if any such there was, by their respectively authorized officers under such circumstances that such common management and control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil refined from petroleum other than oil which was the subject of interstate as distinguished from local commerce, or to fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas competition in the sale of such oil.

Fifth.—Whether or not the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations; if said stock was acquired and combination effected, if any, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil mentioned in the other paragraphs, or if the effect of said combination, if such there were, tended to affect or lessen the competition

in the sale in Texas of said oil, and whether or not the Waters-Pierce Oil Company, if it entered into a monopoly of this character, remained a party to such monopoly for any period of time between March 30, 1903, and April 29, 1907.

The opinion of the Court of Civil Appeals which embraces the entire charge of the trial court is as follows (R., pp. 1141 to 1161):

No. 4212.

THE WATERS-PIERCE OIL COMPANY, APPELLANT,

vs.

THE STATE OF TEXAS, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF TRAVIS COUNTY.

This case involves alleged violations of the anti-trust laws of this State, and as the charge of the able judge who tried the case sufficiently states the nature of the suit as it was submitted to the jury, and correctly defines the provisions of the anti-trust statutes applicable to the case, and states the issues that were decided by the jury, it is deemed proper to set out the charge in full, which is as follows:

"Gentlemen of the Jury:

"In this case the State of Texas, as plaintiff, has sued the Waters-Pierce Oil Company, a private corporation chartered under the laws of the State of Missouri and doing business in Texas by virtue of a permit issued to it by the State of Texas on May 31, 1900, as defendant, to cancel said permit and to recover penalties for violations of the anti-trust laws of Texas which the State alleges the defendant has committed on each and every day from May 31, 1900, to April 29, 1907.

"The State alleges that on or about January 1st, 1870, John D. Rockefeller, John P. Archbold, H. H. Rogers, Henry M. Flagler, and a number of other persons conceived the scheme of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States, including the State of Texas, and that said persons to that end and for that purpose entered into a conspiracy among themselves and with other individuals and corporations, including the defendant corporation, which conspiracy the State alleges continued in force and effect from the date of its formation until the date of the filing of the State's second amended petition in this

case, and the State further alleges that in pursuance of said alleged conspiracy the defendant has done various acts and entered into various agreements which constitute violations of the anti-trust laws of Texas.

"The State further alleges that the defendant's predecessor, the Waters-Pierce Oil Company, incorporated in 1878, on or about the 5th day of October, 1894, entered into a contract with the Eagle Refining Company, A. W. Clem and certain other individuals named in its petition, by the terms of which defendant acquired the property of said Eagle Refining Company, situated in the city of Dallas, Texas, and the right to operate its business under the name of the said Eagle Refining Company. It further alleges that the defendant did, subsequent to May 31, 1900, operate said Eagle Refining Company and maintain the plant thereof at Dallas, as an apparently competing concern for various purposes prohibited by the anti-trust laws.

"The State further alleges that, in the year 1896, the defendant's said predecessor bought out the business of the Texas Oil and Gasoline Company and of one Roy Campbell, who were at that time doing business in the city of San Antonio, Texas, and elsewhere, and entered into contracts and agreements with the said Texas Oil and Gasoline Company and Roy Campbell, whereby said Texas Oil and Gasoline Company was thereafter to be operated under said name by defendant as an apparently competing concern with defendant at San Antonio, in the sale of the products of petroleum. It further alleges that said Texas Oil and Gasoline Company was operated by defendant as a concern apparently competing with it at San Antonio subsequent to May 31st, 1900, for various purposes in violation of the anti-trust laws of the State. For full particulars of the State's allegations you are referred to its second amended original petition.

"The defendant denies all and singular the allegations of the State, and in addition to various of her special defenses, pleads specially that, if it has entered into any of the agreements or committed any of the acts alleged by the State, none of same constitute violations of the anti-trust laws of Texas, because said agreements were made and said acts done (if at all) solely with reference to subjects of interstate commerce. For full particulars of defendant's allegations, you are referred to its third amended original answer.

"As the law of the case you are instructed as follows, viz.:

"I. The burden of proof rests upon the State to establish the affirmative of the issues which will hereafter be submitted in this charge for your consideration by a preponderance of the evidence, and you will find in favor of the defendant on each issue so submitted for your consideration, except such issue or issues, if any, as you find that the State has established by a preponderance of the evidence, and you will return a general verdict for the defendant, unless you find that the State has established by a preponderance of the evidence some combination or combinations of facts which will entitle it to recover under the law as it is given you in charge by the court.

"II. The statute known as the Anti-trust Law of 1899 was in force on May 31, 1900, and thereafter remained continuously in force until March 31st, 1903.

"For the purposes of this charge you are instructed that this act made it unlawful for any corporation transacting or conducting any kind of business in this State to enter into, or become a party to, any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise or to control or limit in Texas the trade in any article of manufacture or merchandise.

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this State to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

"The statute known as the Anti-trust Law of 1903 became effective on March 31st, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill or acts, by two or more persons, firms, corporations or associations of persons, or either two or more of them, for either, any or all of the following purposes, viz.:

"1. To create or which may tend to create or carry out re-

strictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State.

"2. To fix, maintain or increase the price of merchandise in Texas.

"3. To prevent or lessen competition in Texas in the sale of merchandise.

"4. To abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof.

"Said statute of 1903 further defines a monopoly to be a combination or consolidation of two or more corporations when effected in any of the following methods, viz.:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create, a trust as above defined.

"2. When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"III. Oil, all other products of petroleum, and goods, wares or merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the State of Texas and caused to be transported to its agents or others within the State, are the subjects of interstate commerce when they enter this State, and so remain until such commodities are removed from the original tanks, vessels or other packages in which they are imported into the State and become mixed with the common mass of property of similar character in this State. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, pool or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defend-

ant at points outside the State and transported into the State and removed from the original packages or vessels in which it was brought into the State and mingled with other property of similar character in the State, is the subject of interstate commerce, but on the contrary is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this State.

"IV. A corporation such as defendant can only act through its agents and servants, but such a corporation is not liable for all of the acts of its agents or servants. It is liable, however, for the acts done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents, if any, which have been knowingly acquiesced in or ratified by the governing body of said corporation.

"V. Much evidence has been introduced before you relating to the doings and agreements of the agents of corporations other than defendant, and to the doings and agreements of defendant's predecessor's agents prior to June 1st, 1900, and to the doings and agreements of defendant's agents, and the agents of other corporations, outside the State of Texas, and to the doings and agreements of individuals both prior and subsequent to June 1st, 1900, and both outside and within the State of Texas. None of this evidence is competent or can be considered by you against the defendant, except within the limitations and for the purposes hereinafter stated, viz.:

"If you find from a preponderance of the other evidence in the case, independent of all declarations or statements made by any person or persons, except their evidence given while testifying by deposition or personally as witnesses on the trial of this case, that on June 1, 1900, there was formed or existed an agreement between the governing officers of defendant and the governing officers of any of the other corporations alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, or between the governing officers of defendant and any of the individuals alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, then you may consider for what, if anything, you think it worth, such acts or declarations of all the

parties to said agreement, if any, and such acts and declarations of their authorized agents, if any, as were done or made, as the case may be, during the existence of said agreement, if any, and in furtherance of its execution, for the purpose of determining the character of said agreement, and whether or not it contemplated a violation by defendant of the anti-trust laws of Texas.

"You may further consider for what, if anything, you think it worth as tending to show or explain the course of defendant's dealing in Texas, said evidence, if any, of what it did through its duly appointed and authorized agents, if any, outside the State.

"None of said evidence can be considered by you against the defendant for any other purpose whatsoever, and none of it can be so considered by you against the defendant for said purposes, except such of it, if any, as you think proper to be considered when tested by the rules above stated relating to its competency.

"VI. No agreement made by the defendant outside the State of Texas, to violate the anti-trust laws of Texas, if any such there were, can be made the basis for forfeiting its permit to do business in Texas, or for imposing penalties upon it, unless such agreement was executed or attempted to be executed in Texas by the duly authorized agents of defendant; but inasmuch as the undisputed evidence in the case shows that the defendant has continuously maintained its agents in this State and prosecuted its business therein since May 31, 1900, you will be authorized to convict it of violating the anti-trust laws of Texas, if you find from a preponderance of the evidence in favor of the State on the issues submitted for your consideration in paragraphs VII, VIII, IX, X or XI of this charge.

"VII. If you find from a preponderance of the evidence that the defendant company, acting through its duly appointed and authorized agents, entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from petroleum, and if you further find from a preponderance of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, and if you further find from a preponderance of the evidence that the oil with reference to which said agreement or understand-

ing, if any, was so made and carried out, was the subject of local as distinguished from interstate commerce, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph seven of the court's charge. You are instructed in this connection that if you find in favor of the State on the issue above submitted for your consideration in this paragraph of the charge, each day embraced between May 31, 1900, and March 31, 1903, during which the defendant remained a party to the agreement or understanding herein mentioned, if there were any such agreement or understanding, and if it remained a party to same on any of said days, would constitute a separate and distinct violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant was on June 1st, 1900, or on some date subsequent thereto and prior to March 31, 1903, through the action of its duly appointed and authorized agents, a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined from petroleum, and if you do not further find from a preponderance of the evidence that the oil with reference to which defendant entered into said agreement or understanding, if any such there were, was the subject of local, as distinguished from interstate commerce, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph seven of the court's charge.

"VIII. If you find from a preponderance of the evidence that on June 1st, 1900, or on any date subsequent thereto, and prior to March 31st, 1903, the defendant acting through its duly appointed and authorized agents, had brought about or permitted any combination or union of its capital of the Standard Oil Company of New Jersey, whereby the price in Texas oil refined from petroleum, other than oil which was the subject of interstate, as distinguished from local commerce, was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph eight of the court's charge. In this connection you are instructed that if the defendant became a party to a pool of the char-

acter mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that on June 1, 1900, or that on some date subsequent thereto and prior to March 31, 1903, the defendant acting through its duly appointed and authorized agents had brought about or permitted a combination or union of its capital with the capital of the Standard Oil Company of New Jersey, and if you do not further find from a preponderance of the evidence that by said combination or union, if such there were, the price in Texas of oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, was sought to be fixed or regulated, or that thereby the price in Texas of such oil was reasonably calculated to be fixed or regulated, or that thereby the trade in such oil in Texas was sought to be controlled or limited, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph eight of the court's charge.

"IX. If you find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in this State of the business of selling oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, or to fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were on March 31st, 1903, or any date subsequent thereto and prior to April 29th, 1907, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph nine of the court's charge. In this connection you are instructed that if the defendant became a party to a trust of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29th, 1907, that it remained a party to and acted under such trust, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey, for the purpose of creating in Texas, or which tended to create or carry out in Texas restrictions in the free pursuit in this State of the business of selling said character and kind of oil, or to fix, maintain, or increase the price of such oil in Texas, or to prevent or lessen competition in Texas, in the sale of such oil, and that the defendant remained or was a party to, and acted under such combination, if such there were subsequent to March 30, 1903, and prior to April 30, 1907, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph nine of the court's charge.

"X. If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29th, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers, under such circumstances, that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph of this charge, or to fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph ten of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29th, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, and that they were brought under such a common management or control,

if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of such oil, or fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph ten of the court's charge.

"XI. If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29th, 1907, acquired a majority of the captial stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph eleven of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29th, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and if you do not further find from a preponderance of the evidence that said stock was acquired and combination effected, if it were at all, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of said character and kind of oil, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will say by

your verdict, we the jury find in defendant's favor on the issues submitted for our consideration in paragraph eleven of the court's charge.

"XII. The evidence introduced before you does not show with sufficient definiteness that the defendant has, since May 31st, 1900, acted under or persisted in the performance of either the contract with Clem and the Eagle Refining Company and others, or the contract with Roy Campbell and the Texas Oil and Gasoline Company, in such a manner as to violate the Anti-trust Laws of 1899 or 1903. You are therefore instructed to find in defendant's favor on the issues pleaded by the State with reference to said contracts.

"XIII. Evidence has been introduced before you tending to show that the defendant has given rebates and discounts in the course of its dealings; evidence has also been introduced before you tending to show that defendant has made contracts and entered into understandings other than those which have been submitted for your consideration in paragraphs seven to eleven, inclusive, of this charge. Evidence has also been introduced before you tending to show the general course of dealings of defendant in Texas and elsewhere, including some of its business methods in meeting competition. You are instructed that none of this evidence shows or tends to show any violation of the anti-trust laws of Texas, unless it tends in some degree to establish some one or more of the issues submitted for your consideration in the last above mentioned paragraph of this charge; and you are therefore instructed to acquit the defendant and return a general verdict for it—notwithstanding any and all of said evidence, unless you find in favor of the State on the issues submitted for your consideration in some one or more of said paragraphs of the charge.

"XIV. If you convict the defendant under the foregoing instruction of any violation or violations of the Anti-trust Law of 1899, you will specify in your verdict the date or days for which it is convicted of having violated said law, and will further specify in your verdict that for said violation or violations, if any you find, that its permit to do business in Texas shall be forfeited, and the amount of money which shall be adjudged against it as penalties for said violations, if any. In fixing the penalties, if any, which you assess against the defendant for any violations of which you may convict it, of the Anti-trust Law of 1899, you will fix same at not less than two hundred dollars, or more than five hundred dollars per day for each day you find it has so violated

the law. If you convict the defendant of any violations of the Anti-trust Law of 1903, you will specify in your verdict the date or days for which it is so convicted and further specify therein that as a result of said conviction, its permit to do busines in Texas shall be forfeited, and the sum of money that shall be adjudged against it as a penalty for such violation, fixing said sum at fifty dollars per day for each and every day that you convict it of having violated said law.

"XV. In order to aid you in preparing your verdict in proper form, when you have reached same, the following forms of verdicts are submitted for your consideration:

"1. If you find in favor of the State on all of the issues submitted to you and for the entire time for which penalties are claimed by the State against the defendant in its petition, you will say: 'We the jury find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for the penalties at.....dollars; and we find for the plaintiff against the defendant on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days and fix the penalties at seventy-four thousand four hundred dollars. We further find that the permit of the defendant to do business in the State of Texas should be canceled. We find for the defendant upon all the issues made by the pleadings and not submitted in the charge of the court.'

"2. If you find in favor of the State on some of the issues submitted for your consideration, relating to the alleged violation of the Anti-trust Law of 1899, and in favor of the State with reference to some of the alleged violations of the Anti-trust Law of 1903, you may use the following form of verdict:

"'We the jury find in favor of the State on the issues submitted for our consideration in the following paragraphs of the court's charge:

"'We further find that the defendant violated the anti-trust laws of Texas on the following days embraced between May 31, 1900, and March 31, 1903.

"'We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of .....dollars. We further find that the defendant violated the

Anti-trust Laws of 1903, on the following days embraced between the 30th day of March, 1903, and the 29th day of April, 1907.

"'We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of .....dollars. On all other issues raised by the pleadings, we find in favor of the defendant.'

"3. If you find in favor of the State with reference to some or all of the alleged violations of the Anti-trust Law of 1899, submitted for your consideration, and if you find in favor of the defendant on other of said alleged violations, and if you find in favor of the defendant on the issue of all of the alleged violations of the Anti-trust Law of 1903, you may use the following form of verdict:

"'We the jury find in favor of the State on the issues submitted for our consideration in the following paragraph of the court's charge..... We further find that the defendant has violated the anti-trust laws of Texas on each of the following days embraced between May 31, 1900, and March 31, 1903, ...; we further find that because of said violations the permit of the defendant to do business in Texas should be forfeited and penalties should be imposed upon it in the amount of..... dollars. We further find in defendant's favor on all alleged violations of the Anti-trust Laws of 1903, and on all other issues made by the pleading.'

"4. If you find in defendant's favor on all issues submitted for your consideration relating to its alleged violation of the Anti-trust Laws of 1899, but find in favor of the State on all or some of the issues relating to defendant's alleged violation of the Anti-trust Law of 1903, you may use the following form of verdict: 'We the jury find in defendant's favor on all issues submitted for our consideration relating to its alleged violation of the Anti-trust Laws of 1899, but find in favor of the State under the following paragraphs of the court's charge, ..., for alleged violations of the Anti-trust Laws of 1903. We further find that the defendant has violated said anti-trust laws on each of the following days embraced between March 30, 1903, and April 29, 1907, ... We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the sum of.....dollars.'

"5. If you desire to return a general verdict for defendant you may use the following form of verdict: 'We the jury find for the defendant.'

"XVI. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony; but you are bound to take the law as it is given you in charge by the court and to be governed thereby in arriving at your verdict."

All requested instructions were refused. The verdict of the jury reads as follows:

"We the jury find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties, 1,549,500.00 dollars.

"And we find for the plaintiff against the defendant on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days, and fix the penalties at seventy-four thousand four hundred dollars.

"We further find that the permit of the defendant to do business in the State of Texas should be canceled.

"We find for the defendant upon all issues made by the pleadings and not submitted in the charge of the court."

The court rendered judgment for the State in accordance with the verdict for $1,623,900, and a cancellation of the defendant's permit to do business in this State. The defendant has appealed and presents the case in this court on one hunded and twenty-nine assignments of error.

There is evidence in the record which supports the findings of the jury, and we find the facts to be as found by the verdict.

OPINION.

"1. Assisted by elaborate briefs and arguments submitted by able counsel on both sides, this court has given to this important case earnest and careful consideration. The volume of business on our docket and the great number of questions presented preclude extended consideration in this opinion of many of the questions raised in appellant's brief. We therefore announce, in general terms, our conclusion to the effect, that it is *not* shown that error was committed in overruling appellant's application for a change of venue, in various rulings upon exceptions to pleadings, and as to admissibility of testimony.

"A majority of the court also hold that no positive error has been assigned upon the charge of the court. The writer of this opinion is of a different view concerning the eleventh section of the charge, and concurs with counsel for appellant in their contention that it was calculated to mislead the jury into the belief that they could find against the defendant upon the issues therein submitted, regardless of whether it had any knowledge of, participated with, or aided or abetted the Standard Oil Company in the wrongful conduct therein referred to. The provision of the Anti-trust Statute of March 31, 1903, upon which the charge in question was evidently founded, seems to be addressed, in the main, against the corporation which acquires stock or other property of another corporation with the intention of using it for the purpose specified in the statute and it can not properly be construed to include the corporation whose stock or property has been acquired, and subject it to the penalties prescribed by the statute, unless that corporation is, in some manner, responsible for the unlawful acts of the acquiring corporation.

"These are my individual views, and the other members of the court do not concur in the construction placed by me upon the charge. However, we are all agreed that, if the charge in question be erroneous, it affords no ground for reversal, because the jury found that appellant had violated other provisions of the Anti-trust Act of 1903, and awarded only one penalty for each day's violation. Having found for the State on these other issues, if the verdict had been in appellant's favor on the issues submitted by the charge under consideration, the judgment should have been the same; and, therefore, if that section of the charge was erroneous, such error is now harmless and immaterial.

"In reference to the assignment of error complaining of the order of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute a separate appeal from that order, and this court, in considering that appeal, has decided against appellant. It is not entitled to have the order appointing a receiver reviewed by this court twice or in two distinct proceedings.

"2. The constitutionality and validity of the Anti-trust Acts of May 25th, 1899, and March 31st, 1903, have been vigorously assailed in numerous respects. We overrule these objections and hold that these statutes authorize and sustain this suit. (State

vs. Laredo Ice Company, 96 Texas, 467; Waters-Pierce Oil Co. vs. The State, 44 S. W., 936.)

"The contention that these statutes are too indefinite and uncertain in the particulars involved in this case is not regarded as tenable. The Sherman Anti-trust Law enacted by Congress is not more definite and specific than these statutes, and that law has stood the test against similar objections in the Supreme Court of the United States. (United States vs. Knight Company, 156 U. S., 1; United States vs. Trans-Missouri Freight Association, 166 U. S., 291; United States vs. Joint Traffic Association, 171 U. S., 505; Hopkins vs. United States, 171 U. S., 578; Anderson vs. United States, 171 U. S., 604; Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211; Montague & Co. vs. Lowry, 193 U. S., 38; Northern Securities Company vs. United States, 193 U. S., 196.)

"3. This suit was instituted on September 22, 1906, and the defendant interposed a special exception to the petition in so far as it sought to recover penalties for alleged violation of the anti-trust laws of this State prior to the 22d day of September, 1904, for the reason that it appeared from the face of the plaintiff's petition that the right to recover such penalties accrued more than two years before the suit was filed; and was, therefore, barred by the statute of limitation of two years, as prescribed in Article 219 of the Code of Criminal Procedure of this State. That exception was overruled, and the court refused to give the jury a special instruction, requested by appellant, announcing and applying the same proposition of law. These rulings of the trial court are assigned as error, and present one of the most important questions in the case. Chapter 1 of Title 4 of the Code of Criminal Procedure is headed thus: 'The time within which criminal actions may be commenced.' Article 219 reads as follows: 'For all misdemeanors an indictment or information may be presented within two years from the commission of the offense and not afterward.'

"By the Penal Code offenses which are punishable by pecuniary fine only are designated misdemeanors; and appellant's contention seems to be that the things condemned by the Act of May 25th, 1899, upon which this suit in part is based, constitute misdemeanors; and that, although civil in form, the suit is criminal in nature and barred by Article 219 of the Code of Criminal Procedure. It is also contended that the pecuniary penalties imposed by the Act of March 31, 1903, constitutes part of the punishment

prescribed by that act, and that the suit for the penalties accruing thereunder constitutes a criminal case, and is barred by Article 218 of the Code of Criminal Procedure, which bars prosecutions for felonies.

"The second, third, fourth and sixth sections of the Act of May 25, 1899, declare that all persons, firms, corporations or associations of persons who violate those sections 'shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.' The eleventh section states that all who do the things therein condemned shall be 'adjudged a monopoly and be subject to all the pains and penalties provided in this act.' The seventh section provides for the forfeiture of the charter of any domestic corporation and permit to do business granted to any foreign corporation for violations of the statute. The fifth section reads as follows: 'Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act, shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State at the relation of the Attorney General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.'

"The pertinent part of the ninth section is expressed in these words: 'It shall be the duty of the Attorney General and the prosecuting attorney of each district or county, respectively, to enforce the provisions of this act. The Attorney General and the prosecuting attorney shall institute and conduct all suits begun in the district courts, and upon appeal the Attorney General shall prosecute said suits in the Courts of Civil Appeals and Supreme Court.'

"The first section of the Anti-trust Act of March 31st, 1903, defines a trust. The second section defines a monopoly, and the third section prescribes what act shall constitute a conspiracy in restraint of trade. The fourth section declares all trusts, monopolies and conspiracies in restraint of trade to be illegal. The fifth, sixth and seventh sections make provision for the forfeiture of charters of domestic corporations violating that act, and the eighth

section makes a similar provision in reference to the permit of foreign corporations to do business in this State. The seventh and tenth sections use the word 'convicted,' but the seventh relates to the subject of the forfeiture of charter rights, and the tenth to the subject of forfeiture of a foreign corporation's right to do business in the State, which shows that the Legislature did not have in mind a proceeding by indictment or criminal information. The eleventh section reads as follows:

" 'Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney General, or the district or county attorney, under the direction of the Attorney General, to prosecute for recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this act shall be over and above the fees allowed him under the general fee bill.'

"The thirteenth section of that act reads as follows: 'And in addition to the penalties and forfeitures herein provided for every person violating this act may further be punished by imprisonment in the penitentiary not less than one nor more than ten years.'

"We agree with counsel for appellant that these statutes are penal. They were enacted for the purpose of suppressing and preventing certain things regarded by the Legislature as detrimental to the public interest. The penalties prescribed were intended as punishment, but it does not follow that this is a criminal case within the purview of Article 219 of the Code of Criminal Procedure. After a careful consideration of all their terms, we have reached the conclusion that it was the intention of the Legislature in enacting the two statutes under consideration to create a cause of action in behalf of the State for the pecuniary penalties therein prescribed, to be recovered in a civil suit. We reach this conclusion mainly from the language of the fifth section of the Act of 1899, and the eleventh section of the Act of 1903. These sections declare that those who violate any of the provisions of those acts shall forfeit and pay, in the one instance not less than $200 nor more than $5000, and in the other instance $50, to be

recovered in an action in the name of the State. It is true that in some places in these laws the procedure is designated 'prosecutions,' but in others they are spoken of as 'actions' and 'suits.' In the ninth section of the Act of 1899 it is declared to be the duty of the Attorney General and district and county attorneys 'to institute and conduct all *suits* begun in the district courts, and upon appeal the Attorney General shall prosecute said *suits* in the Courts of Civil Appeals and Supreme Court.'

"Section 5 of that act, construed in connection with Section 9, indicates with absolute certainty a legislative purpose to authorize civil suits for the recovery of the pecuniary penalties prescribed. The two sections together indicate that it was not intended that such penalties should be enforced by a criminal proceeding, because if that act creates a criminal offense such offense would be a misdemeanor, of which the district court would have no jurisdiction. The Constitution confers upon that court exclusive jurisdiction of suits by the State for forfeitures and penalties; and it must be presumed that in enacting that statute the Legislature intended to provide for such suits as were authorized by that provision of the Constitution, and not to create criminal offenses of which the county court alone would have original jurisdiction, otherwise the Legislature would not have used the language, 'shall institute and conduct all suits begun in the district courts.'

"It is true that both of these statutes contain some expressions common to criminal procedure, such as 'offense,' 'guilty,' and 'convicted.' The word 'guilty,' however, is frequently used in civil cases, as 'guilty of fraud,' 'guilty of negligence.' And the word 'offense,' as used in these statutes, has reference to violations of their provisions, and is not equivalent to the words 'felony,' or 'misdemeanor.' However, we do not hold that it is necessary to use either of the latter terms to create a criminal offense; nor, on the other hand, do we think that the words 'offense,' 'guilty' and 'convicted' necessarily determine that these are criminal statutes to be enforced exclusively by indictment or information. The word 'suit' is very generally used to designate a civil case, and seldom, if ever, applies to criminal cases.

"As these statutes do not, in terms, require a resort to criminal procedure for their enforcement, then, even if they do not direct any method of enforcement, we are of the opinion that the State had the right to proceed in a civil action for a recovery of the

pecuniary penalties. In such cases it is a well established rule that an action of debt will lie for the recovery of statutory penalties. (5th Ency. Plead and Prac., 907, and authorities there cited.) It has been so decided in this State in Davidson vs. Missouri Pacific Ry. Co., 3 Texas Court App., 173, where it was held that a suit to recover a statutory penalty was an action of debt, and barred by our statute of limitation, which requires actions for debt, where the indebtedness is not evidenced by a contract in writing, to be commenced within two years. That the State may also bring an action for debt for the recovery of statutory penalties seems to be equally well settled. It was so held by the Supreme Court of the United States in Stockwell vs. United States, 13 Wall., 531. That was an action by the government to recover double the value of certain shingles, alleged to have been illegally imported into the United States. The act of Congress upon which the suit was founded reads as follows: 'That if any person or persons shall receive, conceal or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount of value of the goods, wares or merchandise so received, concealed or purchased.' In that case, among other things, the court said:

"'A verdict and judgment having been recovered against the defendants in the court below, the record has been removed into this court and four errors have been assigned.

"'The first is that a civil action of debt will not lie, at the suit of the United States, to recover the forfeitures or penalties incurred under this act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported, for it is conceded that, by the act of importing, an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that when a statute gives a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offense against law it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It can not be that whether an action

of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The A ' of 1823 (3 Stat. at L., 781) fixes the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability, is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

"'But all doubts respecting the matter are set at rest by the fourth section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed and accounted for in the manner prescribed by the Act of March 2, 1799 (1 Stat. at L., 627), entitled "An Act to regulate the collection of duties on imports and tonnage." By referring to the eighty-ninth section of that act, it will be seen that it directs all penalties accruing by any breach of the act, to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector within whose district a forfeiture shall have been incurred is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has been frequently ruled that debt will lie at the suit of the United States to recover the penalties and forfeitures imposed by statutes. U. S. vs. Colt Pet. (C. C.), 145; Jacob vs. U. S., 1 Brock, 520; U. S. vs. Bougher, 6 McLean, 277; Walsh vs. U. S., 3 Wood. & M., 342; U. S. vs. Lyman, 1 Mas., 482; U. S. vs. Allen, 4 Day, 474. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed or purchased with knowledge that they had been illegally imported, "on conviction thereof." It may be, therefore, that an indictment or infor-

mation might be sustained. But the question now is whether a civil action can be brought and, in view of the provision that all penalties and forfeitures incurred by force of the act shall "be sued for and recovered" as prescribed by the Act of 1799, we are of the opinion that debt is maintainable. The expression "sued for and recovered" is primarily applicable to civil actions, and not to those of a criminal nature.'

"As to the point made in reference to the penaties being indefinite under the Act of 1899, in addition to the case just cited, we refer to Rockwell vs. The State, 11 Ohio, 130, where the law fixed the penalty at not less than $5 nor more than $50, and the objection referred to was overruled, and it was held that an action of debt would lie. Other courts have held that statutes somewhat similar to those under consideration confer upon the State a cause of action to be maintained in a civil suit (Burgh vs. The State, 118 Ind., 133; Davis Admr. vs. State, 119 Ind, 555; State vs. Grove, 77 Wis., 448; Territory of New Mexico vs. Baca, 2 New Mex., 183). Interesting discussions of the terms 'fines,' 'forfeitures' and 'penalties' will also be found in People vs. Nedrow, 122 Ill., 363; Gosselink vs. Campbell, 4 Iowa, 300.

"Our conclusion is that the statutes under consideration vest in the State a civil right of action for the pecuniary penalties prescribed for violations of the provisions of those statutes. This being true, and as our statute of limitations applicable to civil cases does not include and bar the State, we hold that limitation is not available as a defense in this case. We do not rest this ruling upon the ground that the statutes under consideration do not create criminal offenses. If it be conceded that they create such offenses, criminal prosecutions for which would be barred within two years, it does not follow that the penalties which might have been recovered by such prosecutions can not, when authorized, be recovered in a civil action. Our Penal Code and Code of Criminal Procedure deal exclusively with criminal cases, and that portion of the latter which deals with the subject of limitation only purports to fix the time within which criminal actions may be commenced; and Article 219, relied on by appellant, merely forbids prosecutions by indictment or information after two years from the commission of the offense.

"It is argued on behalf of appellant that, even though a statute creating an offense may confer upon the State the right to maintain a civil action to recover a pecuniary penalty for violating the

statute, still that right would be barred by Article 219, which would bar the right to enforce the penalty by indictment or information. If Article 219, or any other statute, declared that no right of action should exist or no sort of proceeding be instituted for the collection of a penalty after two years, appellant's contention would be correct; but that article is much narrower in its scope and merely prohibits prosecutions in the manner and by the means prescribed for the prosecution of criminal cases. It may be true that the same general result would be sought in the one case as in the other, viz., recovery of the penalty, and, if that were the only thing to be considered, there would be force in the argument that in prohibiting criminal prosecutions after a specified time the Legislature intended thereby to prevent any other character of procedure which had for its purpose the accomplishment of the same general result. If the two proceedings, civil and criminal, were not so essentially different the contention urged might be sustained; but the statutes under consideration apply to natural persons as well as corporations, and as to such person, civil and criminal proceedings are widely different. In a civil action against an individual to recover a penalty, he is notified of the suit by delivering to him a citation. When the case is tried, if he loses, the only result is a personal judgment against him for a specified sum of money to be collected by execution and not otherwise. But if he is proceeded against criminally for the enforcement of a penalty he is arrested and required to give bond or stay in jail until after the case is tried. Upon trial, if he is convicted, the judgment not only goes against him for the penalty, but, unless he pays it, he is again incarcerated in jail. Thus it will be seen that in a criminal proceeding to enforce the penalty the defendant would necessarily be subjected to the ignominy of an arrest by a public officer; and, upon contingencies which often occur, would be incarcerated in jail. Now when the Legislature prescribed a time which would prevent a prosecution fraught with these serious consequences, does it necessarily follow that it intended to cut off any right the State might have to obtain a personal judgment for a pecuniary penalty, without resorting to a procedure that would bring about any such harsh results? We think not. In prescribing limitation for criminal proceedings we believe the Legislature had in mind cases criminal, both in substance and form, and had no intention of affecting any right the State might assert in a civil action.

"Chief Justice Marshall, in Adams vs. Woods, 2 Cranch., 337, announced that if a law should merely declare that no indictment or information should be presented after a specified time, such law would be pleadable only in bar of indictments or informations, and would not bar a civil action for a recovery of the penalty prescribed for violating a statute.

"An offense which is punishable by imprisonment in the penitentiary, absolutely or in the alternative, is a felony; and as the Anti-trust Act of 1903 fixes confinement in the penitentiary as an alternative punishment, appellant pleaded Article 218 of the Code of Criminal Procedure in bar of the State's right to recover part of the penalties sued for under that act. Article 218 is framed like Article 219, and would apply to a criminal prosecution based upon the Act of 1903 and bar such prosecution after three years. As we hold that it was the intention of the Legislature to confer upon the State the right to maintain a civil action for the pecuniary penalties therein prescribed, we hold that such right of action is not barred by Article 218. In other words, while the penalties referred to were intended, in a certain sense, as punishment, they were not imposed as punishment to be inflicted through the onerous instrumentalities of a criminal prosecution.

"Appellant also pleaded the statute of limitation of two and four years embodied in the Revised Statutes and applicable to civil cases. It is contended that the two years' statute has application upon the theory that if the State's suit is an action of debt, and not instituted for the preservation of the public rights, revenues or property, then the State should not be exempt from limitation, but should be treated as any other litigant. It is the rule of the common law of England that, unless so expressly enacted, limitation does not run against the sovereign, and that is the rule in the American States. We are not prepared to place upon that rule the restriction urged, but if we should do so it would not be proper to apply it to this case. In seeking to recover the penalties here involved, the State is endeavoring to enforce statutes enacted for the protection of the public interest. One of the main objects of the suit is to protect and preserve public rights and promote a well established public policy.

"In view of what we have already said, it is hardly necessary to add that we regard the four years' statute of limitation as equally unavailing. In Brown vs. Sneed, 77 Texas, 471, which holds that limitation does not apply to the State unless so expressly provided,

the authorities are collated and reviewed. We also hold that no error was committed in refusing a charge to the effect that the State must prove its case beyond reasonable doubt. Being a civil case, that rule does not apply.

"4. It is contended on behalf of appellant that the Anti-trust Act of May 25th, 1899, was rendered unconstitutional by the passage of another statute at the same session of the Legislature entitled 'An Act to protect workingmen in the right of organization and the purposes thereof,' approved May 27th, 1899, wherein it was provided that from and after its passage it should be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service in their respective pursuits and employments. By the third section it is declared that that act shall not apply to combinations or associations of capital or capital and persons, natural or artificial, formed for the purposes of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade, and that nothing therein contained shall be held to interfere with the terms and conditions of private contracts with regard to the time of service or other stipulations between employers and employes, and 'that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies.' In view of these limitations placed upon that act, we are of the opinion that it was not the intention of the Legislature to authorize anything to be done that was prohibited by the Act of May 25th, 1899. Hence we hold that this statute engrafts no exemptions upon the anti-trust statute referred to.

"5. The Anti-trust statute of May 25th, 1899, having been superseded and repealed by the Act of March 31st, 1903, which diminished the pecuniary penalties, appellant sought to have the latter statute applied to the time before as well as after it went into effect. This was refused, and we think properly so, on account of this proviso in the latter act: 'Provided nothing in this act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this act took effect.' We

are of opinion that this proviso preserved whatever rights the State had under the former law, including the right to enforce the penalties prescribed by that act. We are unable to concur in the proposition that it was merely intended to preserve the right to, but not the amount of, the penalties. Nor can we sanction the proposition that because of the location of a comma in the proviso quoted it was the intention of the Legislature to protect and preserve the rights of the State to recover penalties from domestic corporations and not preserve such right as against foreign corporations. No reason existing for making such a marked discrimination, we are not willing to hold that it was the intention of the Legislature to do so, merely because a comma was so used as to render that construction plausible. In construing written laws, courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention.

"6. It is claimed that the trial court should have granted appellant's motion for a new trial based upon the ground that the judgment imposes excessive fines, and operates as a deprivation of property without due process of law. It is also contended that the Act of 1899 should be declared void, because it authorizes excessive fines and forfeitures. That question has already been decided against appellant's contention in State vs. Laredo Ice Co., 96 Texas, 467. The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence we have reached the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives.

"7. In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged, the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this State. The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this State, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competi-

tion in its sale in a large and specified territory, including the State of Texas; and that, to a large extent, such object has been accomplished. In so far as that agreement related to this State, appellant, acting by its agents, performed it within this State; and such performance within the limits of the State constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been made in this State. To a large extent the case rests upon circumstantial evidence; but we can not say that the jury were not warranted in the conclusions drawn from it. Hence we hold that the verdict is supported by testimony, and no error was committed in overruling the motion for a new trial.

"Upon the whole case our conclusion is that reversible error has not been shown, and, therefore, the judgment will be affirmed.

"Affirmed.

"W. M. KEY,
"Associate Justice.

"Filed December 11, 1907."

In this connection we desire to call the court's attention to an evident misprint of Section 8 of the charge of the court as it appears in the opinion copied in the record, because upon examination of said Section 8 appearing on page 289 of the record it is apparent that there is a misprint or clerical omission in such section as copied in the opinion of the Court of Civil Appeals.

The verdict of the jury was that the Waters-Pierce Oil Company had violated each and every section of the Act of 1899 and of the Act of 1903 submitted for their consideration in the charge of the court for each and every day charged. The Court of Civil Appeals held that there was evidence in the record which supported such findings of the jury and that court found the facts to be as found by the verdict, viz., that the Waters-Pierce Oil Company had violated each of the provisions of each of the acts for the number of days charged in so far as such issues were submitted to the jury.

The questions then for determination are, whether or not there is a Federal question involved in this case, and, second, whether or not such Federal question is a real question as distinguished from a colorable or fictitious one.

There are various assignments of error made by the plaintiff in

error upon which it asks this court to revise the decision of the Court of Civil Appeals.

The first, second, fourth, fifth, sixth, ninth, tenth, eleventh, thirteenth, fourteenth, sixteenth, seventeenth and eighteenth assignments of error all complain of the action of the court and the holdings of the court based upon provisions of the Acts of 1899 and 1903 which, it is asserted, are invalid because of their repugnance to various provisions of the Federal Constitution. As will be noticed, all of these matters involve purely the question of the ownership of a majority of the stock by the Standard Oil Company of New Jersey of the Waters-Pierce Oil Company. It will be sufficient to say that as the Waters-Pierce Oil Company was only tried and convicted for remaining a party to the unlawful combination after the acquisition of the stock for the illegal purpose by the Standard Oil Company of New Jersey, there can possibly be no Federal question in the case under any phase of the matter, but it is not necessary for this court to investigate to ascertain whether or not such Federal question could be raised for the reason that the Waters-Pierce Oil Company was found by the jury to have been guilty of violations of other provisions of the anti-trust laws, both of 1899 and 1903, without regard to the question of stock ownership, and there is no rule better settled by this court than the one that the Federal question must have been the controlling question in the decision of the case in the State court, and there must not have been any other independent question upon which the State court predicated its opinion or could have predicated its opinion without involving the decision of the Federal question.

See M., K. & T. R. R. Co. vs. Ferris, 179 U. S., 602.
Hammond vs. Johnson, 142 U. S., 73.
Harrison vs. Morton, 171 U. S., 38.
Klinger vs. Missouri, 13 Wall., 257.

The Court of Civil Appeals held and decided that irrespective of the question of stock ownership, irrespective of any error that might have been committed by the trial court in charging on this question, the charge did not affect the case, because they say, in discussing whether or not the court correctly charged on the stock ownership proposition:

"However, we are all agreed that if the charge in question be erroneous it affords no ground for reversal, because the jury found

that appellant had violated other provisions of the Anti-trust Act of 1903, and awarded only one penalty for each day's violation. Having found for the State on these other issues, if the verdict had been in appellant's favor on the issues submitted by the charge under consideration, the judgment should have been the same, and, therefore, if that section of the charge was erroneous, such error is now harmless and immaterial."

As shown by the record, and as stated by the Court of Civil Appeals, the jury found the Waters-Pierce Oil Company guilty of violating provisions of the Anti-trust Laws of 1899 and 1903, other than sections which made it an offense for one corporation to acquire the capital stock of another corporation for the purpose of affecting competition. They were charged with and found guilty of violating the provisions of both the Act of 1899 and 1903 prohibiting agreements or understandings between two or more persons, firms or corporations fixing or regulating prices in Texas of oil refined from pertoleum.

There can not then possibly be a Federal question predicated upon the holding of the State court giving validity to so much of the anti-trust laws of the State of Texas which prohibited the acquisition of the stock of one corporation by another corporation for the purpose of affecting competition or controlling or regulating the prices and output of oil.

As stated, this court has too often held that where the State court, although it may pass upon a Federal question and decide the validity of a State statute that is claimed contravenes the Federal Constitution, yet, if there is another independent ground upon which the State court rests its decision or could have rested its decision, then this court will not review the decision of the State court in deciding such Federal question because this court does not pass on moot cases.

Assignments 3 and 15 challenge the action of the court in allowing a recovery for acts that it was claimed were committed prior to the passage of the Acts of 1899 and 1903, respectively, and the introduction of testimony concerning such acts, and thus undertakes to raise a Federal question, but an examination of the charge of the court shows that this attempt is but "the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought when all other resources of litigation have been exhausted."

See Chicago I. & L. R. Co. vs. McGuire, 196 U. S., 127.

The lower court expressly charged "no agreement made by the defendant outside the State of Texas to violate the anti-trust laws of Texas, if any such there were, can be made the basis for forfeiting its permit to do business in Texas or for imposing penalties upon it unless such agreement was executed or attempted to be executed in Texas by the duly authorized agents of defendant." (R., p. 1145.)

And, again, the court charged the jury as follows:

"V. Much evidence has been introduced before you relating to the doings and agreements of the agents of corporations other than defendant, and to the doings and agreements of defendant's predecessor's agents prior to June 1, 1900, and to the doings and agreements of defendant's agents, and the agents of other corporations, outside the State of Texas, and to the doings and agreements of individuals both prior and subsequent to June 1, 1900, and both outside and within the State of Texas. None of this evidence is competent or can be considered by you against the defendant, except within the limitations and for the purposes hereafter stated, viz.:

"If you find from a preponderance of the other evidence in the case, independent of all declarations or statements made by any person or persons, except their evidence given while testifying by deposition or personally as witnesses on the trial of this case, that on June 1, 1900, there was formed or existed an agreement between the governing officers of defendant and the governing officers of any of the other corporations alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, or between the governing officers of defendant and any of the individuals alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, then you may consider for what, if anything, you think it worth, such acts or declarations of all the parties to said agreement, if any, and such acts and declarations of their authorized agents, if any, as were done or made, as the case may be, during the existence of said agreement, if any, and in furtherance of its execution, for the purpose of determining the character of said agreement, and whether or not it contemplated a violation by defendant of the anti-trust laws of Texas.

"You may further consider for what, if anything, you think it worth, as tending to show or explain the course of defendant's

dealing in Texas, said evidence, if any, of what it did through its duly appointed and authorized agents, if any, outside the State.

"None of said evidence can be considered by you against the defendant for any other purpose whatsoever, and none of it can be so considered by you against the defendant for said purposes, except such of it, if any, as you think proper to be considered when tested by the rules above stated relating to its competency."

Again, assignments 7 and 8 undertake to raise a Federal question because the statutes of 1899 and 1903 were so indefinite, vague and uncertain, and so indefinitely framed and of such doubtful construction that it could not be ascertained by the language used that particular acts constituted an offense and that they could not be understood either from the language in which they were expressed or from some other written law of the State, and that therefore the defendant was deprived of its property without due process of law because of the infliction of penalties thereunder. This is but another attempt to clutch at the jurisdiction of this court when all other litigation has proved ineffectual.

As was stated in the case of Simon vs. Craft, 183 U. S., 427, the essential elements of due process of law are notice and an opportunity to defend.

In this case the record shows that notice was issued and that the plaintiff in error not only had an opportunity to defend but did defend and had a trial in the court before a jury, took their appeals in the regular course, had the matters passed on by the appellate courts of the State. In other words, they have had their day in court, and it makes no difference whether the trial court erroneously administered the law or whether it correctly administered the law, the plaintiff in error can not complain of the want of due process of law for the reason that it has had every chance to be heard, was heard, and had all these matters passed on in a court of competent jurisdiction.

See Remington Paper Co. vs. Watson, 173 U. S., 443.
New Orleans Waterworks vs. Louisiana, 185 U. S., 336.
Kennard vs. Louisiana, 92 U. S., 480.
Lent vs. Tillson, 140 U. S., 316.
C., B. & Q. R. R. Co. vs. Chicago, 166 U. S., 226.

In the case of the Remington Paper Co. vs. Watson, supra, this court says:

"The appointment of a receiver to take possession of the prop-

erty of an insolvent corporation upon the petition of a creditor is certainly due process. This, of course, is not denied, but the invalidity of the order of appointment is asserted because it was made ex parte and because Watson had not fully qualified. It is hence argued that the appointment was a nullity and constituted no legal obstacle to the proceedings in the United States Circuit Court. * * * The action was regularly proceeded with and was determined against plaintiff in error on grounds that it did not involve Federal questions, and, therefore, it is not within our power to review the judgment of the Supreme Court of the State. The plaintiff in error then sought in the State court, and was given an opportunity to litigate the rights claimed by it, and it can not complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully."

As was held further in the case of Simon against Craft, supra, "the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court should be by particular mode but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it. * * * If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the State court as to the regularity under the State statute of the practice pursued in the particular case."

Again, an examination of these statutes will disclose that they are not vague, indefinite and uncertain, and not only has the State court of Texas repeatedly held that they were not vague and indefinite, but the Supreme Court of the United States, in the case of National Cotton Oil Co. vs. Texas, 197 U. S., 115, upheld the provisions of both of said laws.

So far as the acts done and committed by the Waters-Pierce Oil Company were concerned for which it was convicted and penalties assessed, the acts themselves would have all been unlawful at common law, and Texas is a common law State, and the infliction of penalties was all that was necessary for the statute to do, because the acts, as stated, that were committed would have been illegal if there had been no statute denouncing the commission of such acts.

If a Federal question could be made by the mere statement in an assignment of error that a statute is so vague, indefinite and

uncertain in its provisions that a defendant is not put on notice of what acts are charged to be a violation of the law, then every case in every State court that is prosecuted for violations of a State statute could be brought to this court on a writ of error by simply alleging that the provisions of the act were vague, indefinite and charged no offense. This court will require more than such bare assertions. If upon an inspection by this court of the law itself it should determine that such criticism was without merit, then it will hold that there is no Federal question, although it may be necessary to examine the statute to do so, and we respectfully say that if the court does examine the two statutes it will find that not only is there no merit in the claim of plaintiff in error that the statutes are vague, indefinite and uncertain in their terms, but that the State court was right in holding that they defined an offense.

In so far as the question of whether or not particular acts shown to have been done constituted an offense under those statutes, this court will not concern itself for the reason that it is bound by the holding of the State court on those points, whether there was much or little evidence to support the finding of that court. The only thing this court will or can concern itself with is, does the legislation, not the act of the court under it, but does the legislation complained of violate the Constitution of the United States or the laws made under it?

Assignments 12 and 19 complain of the refusal of the trial court because it is said that it did not properly charge the law or that it failed to give proper charges.

These are matters of practice, mere irregularities, and can not be considered by this court, even if there were merit in the contentions.

Kennard vs. Louisiana, 92 U. S., 480.
Lent vs. Tillson, 140 U. S., 316.
C., B. & Q. R. R. Co. vs. Chicago, 166 U. S., 226.

The twentieth assignment of error is as follows:

"There is also manifest error in this, that the penalties of $1,549,500 and $74,400 assessed by the jury are, respectively, so plainly excessive that the defendant is thereby deprived of its property without due process of law."

The statement of this assignment is a refutation of the claim that it raises a Federal question, because as has repeatedly been

held by this court the provision in the Federal Constitution against excessive fines and penalties only applies to acts of Congress and not to State legislation. There is identically the same provision in the Constitution of the State of Texas against excessive bail, fines and cruel and unusual punishment being required or inflicted as is contained in the Constitution of the United States, and whether or not the Acts of 1899 and 1903 impose such fines and penalties is a matter for the State courts to decide and not this court, and the contention of the plaintiff in error was not only decided adversely to it in this case, but the Supreme Court of the State had already held in the case of State vs. Laredo Ice Company, 96 Texas, 461, that the Act of 1899 did not impose excessive fines or penalties or cruel and unusual punishment. But, in any event, if a Federal question could be predicated upon the excessiveness of the fines and penalties, certainly no such Federal question is here presented or was presented in the State court, because it is claimed that the excessive penalties deprive plaintiff in error of its property without due process of law, not that it was denied the equal protection of the law, or any other question that might have been raised in connection therewith, but simply that it is deprived of its property without due process of law, although it had a full and complete hearing in the State court and tried this and every other issue involved in the case.

As stated, the mere statement of the assignment of error refutes the assignment itself, because every element of due process of law is found not only in the act itself, but in the conduct of the case all the way through the State court, because the act provides for the infliction of penalties only upon conviction in the ordinary course, and the penalties were inflicted only upon a conviction in the ordinary course, and, therefore, due process of law has been meted out to the defendant. The trouble is that due process has been administered to the plaintiff in error and that is the basis of its complaint.

The twenty-first assignment of error relates purely to the refusal of the court to sustain the contention of the plaintiff in error that the cause of action of the State was barred by limitation.

The construction of the State courts upon its statutes of limitation is binding upon the Federal courts, and as no right is guaranteed or denied by limitation statutes of any kind, there can be no Federal question predicated upon any construction of a limitation statute of a legal character.

Pim vs. St. Louis, 164 U. S., 273.

The twenty-second and twenty-third assignments of error complain of the action of the trial State court in refusing to sustain exceptions to portions of defendant in error's petition and refusal to give special charges asked by the plaintiff in error covering the phase of the case made by the pleadings of the defendant in error, charging agreements about divisions of territory between the plaintiff in error and the Standard Oil Company of New Jersey. It is sufficient to say that the court did not authorize a conviction of the plaintiff in error for any such agreement, no such question was passed on in the State court of appeal, and, therefore, there is nothing upon which to base this assignment of error. On the contrary, the State trial court instructed the jury to find for the plaintiff in error upon all issues made by the pleadings and not submitted to the jury in paragraphs VII to XI, inclusive, in the charge of the court, and we submit that an examination of the charge will disclose that not the shadow of a cause of action or offense is submitted in either of these charges of the court growing out of any such division of territory.

The twenty-fourth assignment of error challenges the trial court's action in admitting certain testimony. It is absurd to say that irregularities or mistakes of the trial court in admitting testimony could be made the basis of a Federal question.

Assignments of error Nos. 25, 26, 27 and 28 undertake to call in question the action of the trial court in appointing a receiver for the property and assets of the plaintiff in error.

It is sufficient to say that in this case the Court of Civil Appeals expressly declined to pass upon the questions here raised in this cause, and said:

"In reference to the assignments of error, complaining of the order of the court appointing a receiver, it is sufficient to say that the appellant has exercised its right to prosecute a separate appeal from that order, and this court in considering that appeal has decided against appellant. It is not entitled to have the order appointing a receiver reviewed by this court twice or in two distinct proceedings."

It is respectfully submitted that the writ of error should be dismissed, because there is not the shadow of a Federal question made in the record, and if it should not be dismissed that then the case

should be affirmed because the alleged Federal questions are not real but frivolous and without merit.

Robert V. Davidson
Attorney General.

Jewel Pilgrim
Assistant Attorney General.

John W. Brady

Geo. Allen

Counsel for the Defendant in Error, The State of Texas.

In the Supreme Court of the United States

October Term, 1920

No. 339

WATERS-PIERCE OIL COMPANY, Plaintiff in Error,

vs.

STATE OF TEXAS, Defendant in Error.

ANSWER OF THE PLAINTIFF IN ERROR

TO THE MOTION OF THE DEFENDANT IN ERROR

TO DISMISS THIS CAUSE

[redacted] STOREY

L. THORNBURG

Counsel for the Plaintiff in Error

(21,139)

In the Supreme Court of the United States

OCTOBER TERM 1908

No. 359

WATERS-PIERCE OIL COMPANY . . . PLAINTIFF IN ERROR

AND

STATE OF TEXAS . . . . . DEFENDANT IN ERROR

ANSWER of the Plaintiff in error to the Motion of the Defendant in error to dismiss.

1. This cause was advanced by an order of this Court made on the 4th May last upon the motion of the Defendant in error and was thereby assigned for argument on last Tuesday, the 13th October, after the cases already set down for that day.

2. At the same time the cause No. 360 of this term, between the same parties and having the same title as this cause, was advanced by a like order and assigned for argument on the same day, and a motion previously made by the Defendant in error to dismiss the writ of error in that cause was postponed to the hearing of the case on its merits.

3. Both of the said causes now stand on the list of causes for argument on the said 13th October and have not yet been reached, and a motion has been made by the Plaintiff in error to consolidate the cause No. 360 with this cause.

4. The questions raised by the motion of the Defendant in error to dismiss the writ of error in this cause involve the merits of the case and are discussed in the brief which is about to be filed on behalf of the Plaintiff in error, and they cannot be dealt with separately from the merits of the whole case. It is submitted that these questions can be best discussed and considered at the hearing of the case on its merits, which will probably be had within a very short time, but if the Court prefers to consider them previously, reference is hereby made to the said brief which is about to be filed and in which they are fully discussed.

5. The Plaintiff in error prays that the said motion may be postponed, as in the case of the like motion in No. 360, to the hearing of the case on its merits.

MOORFIELD STOREY.
J. L. THORNDIKE.

19TH OCTOBER 1908.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

NO. 359 AND NO. 360.

WATERS-PIERCE OIL COMPANY,
Plaintiff-in-Error,
vs.
STATE OF TEXAS,
Defendant-in-Error.

STATEMENT.

In 1899, the Legislature of Texas enacted a law in fifteen sections against pools, trusts and monopolies in trade which took effect January 31, 1900, the substantial provisions of which, so far as this cause is concerned, are comprised in Sections 1 to 8, which are as follows:

> "Section 1. Any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this State, or any partnership, or individual or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or the pre-

mium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act.

Section 2. A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, property assets, trade, custom, skill or acts, or of any other valuable thing or possession, by or between persons, firms or corporations, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a 'monopoly,' as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade, or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificases of stock or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the

meaning of this act, if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly,' as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or association of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

Section 3. If any person, persons, company, partnership, association or corporation, engaged in the manufacture of any article of commerce or consumption from the raw material produced or mined in this State, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell at less than the cost of manufacture, or give away their manufactured products, for the purpose of driving out competition or financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished product produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction shall be subject to the penalties of this act.

Section 4. If any person, persons, company, partnership, association, corporation or agent engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured or mined in this State or elsewhere, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way, or give away within this State, their products for the purpose of driving out competition or financially injuring competitors engaged in similar business, said person, persons, company, partnership, association, corporation or agent resorting to this method of securing a monopoly within this State in such business, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction thereof shall be subject to the penalties of this act.

Section 5. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation

or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the state treasury, and to become a part of the general fund, except as hereinafter provided.

Section 6. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding any such article or thing aforesaid, it shall be a violation of this act; and any person, firm, corporation or association of persons committing such violation shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

Section 7. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this act, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in the State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other state or country, which shall violate any of the provisions of the preceding sections of this act shall there-

by forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in the State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State, has been, while acting as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act, shall be received as *prima facie* proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, to the Commissioner of Insurance, Statistics and History of the State, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation."

This act was repealed by an act which became effective March 31, 1903, the provisions of which substantially affecting this case are comprised in the first thirteen sections, which are as follows:

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: 1. To create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State. 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any produce for market or transportation. 3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation. 4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise,

produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established. 5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected. 6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation. 7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.

Section 2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first

section of this Act. 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

Section 3. That either or any of the following acts shall constitute a conspiracy in restraint of trade: 1. Where any two or more persons, firms, corporations, or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity. 2. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

Section 4. Any and all trusts, monopolies and conspiracies in restraint of trade as herein defined, are hereby prohibited and declared to be illegal.

Section 5. Any corporation holding a charter under the laws of the State of Texas, which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

Section 6. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney-General, upon his own motion, and without leave or order of any judge or court, to institute suit or **quo warranto** proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

Section 7. When a corporation organized under the laws of this State shall have been convicted of a violation of any of the provisions of this Act, and its charter and franchise has been forfeited, as provided in section 5, no

other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas.

Section 8. Every foreign corporation violating any of the provisions of this Act is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proceedings in the district court of Travis County, in the name of the State of Texas.

Section 9. The provisions of Chapter 92 of the Revised Statutes of this State of 1895, to prescribe the remedy and regulate the proceedings by **quo warranto**, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this Act.

Section 10. When any foreign corporation has been convicted of a violation of any of the provisions of this Act, and its right to do business in this State has been forfeited, as provided in Section 8 of this Act, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations shall be permitted to incorporate or do business in Texas.

Section 11. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this Act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General, or the district or county attorney under the direction of the Attorney-General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this Act shall be over and above the fees allowed him under the general fee bill.

Section 12. Any contract or agreement in violation of the provisions of this Act shall be absolutely void and not enforcible either in law or equity.

Section 13. And in addition to the penalties and forfeitures herein provided for, every person violating this

Act may further (be) punished by imprisonment in the penitentiary not less than one nor more than ten years.

Under the provisions of these two acts, the Attorney-General of Texas and the County Attorney of Travis County of that State, on the 22nd of September, 1906, instituted a suit against the Waters-Pierce Oil Company to recover penalties under the Act of 1899, from the 29th day of May, 1900, until the 31st day of March, 1903, at the rate of five thousand dollars per day and under the Act of 1903 from the 31st day of March, 1903, until April 29, 1907, the date at which the last amended petition was filed, at the rate of fifty dollars per day.

The facts are: That in 1878 a Waters-Pierce Oil Company was organized to succeed the partnership of Waters, Pierce & Company, oil merchants of St. Louis. Its capital was one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars each and was subscribed and owned, 40 per cent by Waters, Pierce & Company; 20 per cent by Chess Carley & Company; and 40 per cent by Hutchings & Thompson. In June, 1882, its capital was increased to four hundred thousand dollars and at that time its stock ownership stood: Hutchings & Thompson and Chess Carley & Company, 2,750 shares; H. C. Pierce, 1,250 shares. Subsequent to this time Hutchings & Thompson and Chess Carley & Company transferred their 2,750 shares to the trustees under what is generally known as the Standard Oil Trust Agreement of January 2, 1882, which we will later refer to. Mr. Pierce continued to own his shares up to the date of the dissolution of the company in May, 1900, and from the date of the organization of the company down to the date of its dissolution, managed and controlled its affairs.

When this company was first organized, it was distinctly agreed that its management should be conducted by Mr. H. C. Pierce who was then an experienced oil merchant, familiar with the trade and territory to which its business was to be confined, and this agreement was complied with until the dissolution of the company at the time above stated. The territory which this company was organized to develop and serve was a small

part of Illinois, a part of Louisiana, and practically all that part of Missouri south of the Missouri River, Arkansas, Texas the Indian Territory and the Republic of Mexico. The oil business was then comparatively new and insignificant and the territory allotted to this company practically undeveloped in the oil trade. The business, in the opinion of the management of the company required great detail in facility for merchandising and watchfulness in upbuilding the business. To encourage the purchase of oil and popularize it and make its merchandise convenient and easy and to economize in the cost, the company, under Mr. Pierce's management, acquired tank cars for transporting the oil in bulk from the refineries to distributing stations where large local tanks were built to receive it in bulk; provided tank wagons in which to locally distribute oil in large or small quantities to dealers within a radius of ten to fifteen miles; and contrived iron barrels to ship to longer distances that could not be reached by wagon wherein the evaporation of oil would not take place and thereby occasion loss to the merchant—in short, every convenience that would administer in the economy of handling the oil, both to the consumer and its customers, and cheapen its use was instituted and enlarged upon as the business grew in proportions and the population of the territory in which its plant was constructed increased. By reason of these facilities and the increase in the population of this territory, the company's business grew from the sale of a few hundred thousand barrels at the date of its organization into millions of barrels before its dissolution.

This company was never a manufacturing or refining company in the United States. The only sources from which it could get in quantity and quality with promptness the oil necessary to supply its customers was the Standard Oil Company of Ohio and its successors in the refining business. From 1892 until the dissolution of the company its directorate consisted of Mr. Pierce, Mr. Findley, Mr. Pierce's brother-in-law, Mr. C. M. Adams, who had been with the company nearly all of its corporate life as an employee, Mr. Gruet, who had been employed by Mr. Pierce, and Mr. H. M. Tilford who resided in

New York. The home office of the company was at all times located at St. Louis and its business managed and ordered from there.

In 1900 a suit, which had been brought against this company by the State of Texas for the cancellation of its license to do business there because of a violation of some provision of the Anti-Trust Law of that State, culminated in a final judgment against it. This proceeding was based upon the acts of some of the agents of the company in making so-called exclusive contracts with local dealers which were held to be forbidden by the laws of Texas.

The Waters-Pierce Oil Co. v. Tex., 177 U. S., 28.

Thereupon, on the 28th day of May, 1900, this company was dissolved and a new company with the same name was, on the 29th day of May, 1900, organized under and pursuant to the laws of the State of Missouri. It was organized with a capital of four hundred thousand dollars by Mr. Pierce who subscribed and paid for the entire issue of stock. It took over all the property of the old company and gave notes in payment therefor which were subsequently honored at maturity.

At the time of the dissolution of the old Waters-Pierce Oil Company, the Standard Oil Company of New Jersey had acquired the 2,750 shares which had previously been owned by Hutchings & Thompson and Chess Carley & Company and their successors, the trustees under the Standard Oil Trust Agreement of January 2, 1882. It is not pretended that Mr. Pierce did not consult the owner of the majority of stock in disposing of the property of the old company and its acquisition by the new. Counsel reported to Mr. Pierce, after a consultation with counsel representing the larger interests, that it had been understood that if the Standard Oil Company should retain the same interest in the new company it had in the old, it could do so, and accordingly, in the following September, Mr. Pierce transferred to it in blank the same number of shares in the new company that it had held in the old with the understanding that the shares should remain in his name on the stock book so as to give him the technical as well as the actual control of the company.

After the new company was organized its affairs and policies were managed by an executive committee at St. Louis, composed of Mr. Pierce, Mr. Findley, Mr. Pierce's brother-in-law, Mr. Adams, who had been employed by Mr. Pierce in the old company, Mr. Gruet, who had also been employed by Mr. Pierce in the old company, Mr. Johnson, general counsel, who had been Mr. Pierce's personal attorney, Mr. Johnson, Mr. Pierce's brother-in-law, and Mr. Ackert, a relative of Mr. Pierce. Neither the old nor the new Waters-Pierce Oil Company was ever a producer or refiner of oils in the United States, but acted as merchant for the brands of oil which had been established by the old company, and were manufactured for it and the new company by the refineries of the Standard Oil Company; both of them refined in Mexico oils which were sold there from crude oils which were purchased from the Standard Oil Company.

Mr. Pierce owned no stock or other interest in any oil producing or merchandising company other than the Waters-Pierce Oil Company. His business life had been devoted to developing and building up the business and trade of the Waters Pierce Oil Company, and during all of the time of its existence he was the principal manager and director of its affairs and controlled its policies. Because of the large volume of business between the Standard Oil Company and the Waters-Pierce Oil Company, there was of necessity a great volume of correspondence between the St. Louis officers of the Waters-Pierce Oil Company and those of the Standard Oil Company at 26 Broadway, New York. This correspondence related to business dealings between the two companies of such character as would usually take place between persons engaged in constant trade as manufacturer and merchant. The Standard Oil Company of New Jersey was an owner of a little more than a two-third interest in the Waters-Pierce Oil Company, and had a just and legal right to be informed from the offices of the latter, or through appointed agents, of the financial and business condition of the Waters-Pierce Oil Company. The testimony is clear, conclusive and positive that, as to the purchasing of

oil and the sale of oil in its territory, the Waters-Pierce Oil Company's management was entirely independent of any control or agreement between it and the officers of the Standard Oil Company or any other company whatsoever. It was neither claimed nor proven that the Waters-Pierce Oil Company of 1900, since its organiztion, had combined or confederated with any person or corporation, either in Texas or elsewhere, to fix or maintain the prices of any commodities in which it dealt or became a member of any trust or pool through which it shared in the earnings of any competitor, or that in any manner or form it sought to limit or control the output of any commodities in which it dealt.

The most important claim of infraction of either the Acts of 1899 or 1903, is that the Standard Oil Company of New Jersey owned about 60 per cent. of the shares of its capital stock.

This plainly will appear from the charge of the court to the jury and the evidence. During the course of the trial, against the defendant's objections, the State offered in evidence an agreement commonly called the Standard Oil Trust Agreement, dated the second day of January, 1882, made "Exhibit A" to the bill and an agreement supplemental thereto, marked "Exhibit B." It was agreed that the Waters-Pierce Oil Company did not sign this agreement, neither did Mr. Pierce nor was Mr. Pierce's stock ever deposited under the agreement.

The Standard Oil Company could not do business in Texas without a permit. It never did any business in Texas and never applied for a permit to engage in business there. It was always a refining company from which the Waters-Pierce Oil Company purchased its supplies.

The petition of the State of Texas charged that the Waters-Pierce Oil Company had conspired with John D. Rockefeller, John D. Archbold, Henry M. Flagler and a number of other persons and corporations on, or about January 1st, 1870, for the purpose of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States and in the State of Texas; that the predecessor of this plaintiff-in-error, the (old) Waters-

Pierce Oil Company, incorporated in 1878, had become a party to said conspiracy, and had entered into contracts with certain corporations and individuals engaged in the business of selling petroleum and the products thereof in the State of Texas by the terms of which said plaintiff-in-error acquired the properties of said individuals and corporations, all for the purpose of monopolizing the business of selling petroleum and the products thereof within said State and suppressing competition therein. Said petition further alleged that the said Waters-Pierce Oil Company, plaintiff-in-error, had entered into an agreement with the Standard Oil Company, a corporation organized under the laws of New Jersey, for the further purpose of monopolizing the trade in petroleum and the products thereof in the State of Texas; and, for the further purpose of carrying out said contract and conspiracies, had permitted the said Standard Oil Company to acquire a majority of the shares of stock of the said Waters-Pierce Oil Company and had thereby transferred the management and control of the said Waters-Pierce Oil Company to the said Standard Oil Company of New Jersey; that the Waters-Pierce Oil Company, plaintiff-in-error, not only succeeded to all the property of its predecessor, the Waters-Pierce Oil Company, which voluntarily dissolved May 29, 1900, but also assumed all the contracts and agreements of said predecessor, especially those above referred to, with the Standard Oil Company of New Jersey and other corporations and individuals; and that said plaintiff-in-error had effected a mere nominal reorganization for the purpose of perpetrating a fraud upon the State of Texas, and to enable the company to maintain its business in said State, and that the permit of said plaintiff-in-error to do business in Texas was fraudulently obtained. Said petition further charged that the said Waters-Pierce Oil Company was dominated and controlled in its business by the Standard Oil Company of New Jersey; that through the contracts and conspiracies aforesaid a large number of individuals and corporations doing business in the sale of oil and petroleum products were excluded from doing business within said State, whereby competition was

suppressed and destroyed and a substantially complete monopoly in petroleum products established. Said petition further alleged that said acts, conspiracies and agreements were done, continued and performed by plaintiff-in-error upon each and every day from the 31st day of May, 1900, to the 31st day of March, 1903, in violation of the Anti-Trust Act of 1899, and from the 31st day of March, 1903, up to the time of bringing this suit upon each and every day within said period in violation of the Anti-Trust Act of 1903. (Transcript, pp. 1 to 39.)

To the petition of the State of Texas, plaintiff-in-error made answer by general and special exceptions, general denial and certain special pleas wherein plaintiff-in-error denied the constitutionality of said Acts of 1899 and 1903 in so far as it was sought thereunder to hold plaintiff-in-error liable for the acts and things alleged and charged in said petition, and further defended that if the petition of the State of Texas and the prayer therein should be granted, this plaintiff-in-error would be denied the equal protection of the laws, be subjected to **ex post facto** laws, deprived of its property without due process of law, and have the obligation of its contracts impaired, all contrary to the express provisions of the United States Constitution. (Transcript, pp. 43 to 95.)

Trial was had at the May Term, 1907, of the District Court of Travis County, Texas, resulting, on June 1st, 1907, in a verdict in favor of said State of Texas and against this plaintiff-in-error for the sum of $1,623,900.00, and cancelling said permit of plaintiff-in-error to do business in the State of Texas, whereupon said District Court of Travis County, Texas, entered judgment in accordance with said verdict, that the State of Texas have and recover from plaintiff-in-error herein the sum set forth in said verdict, with interest and cost of suit and did order and decree that the permit of the said Waters-Pierce Oil Company, plaintiff-in-error, to do business in the State of Texas be cancelled and that the said Waters-Pierce Oil Company be perpetually enjoined and prohibited from doing any and all business, except interstate business, within the State of Texas. (Transcript, pp. 334 and 335.)

In due time, plaintiff-in-error filed its motion for a new trial, which motion was overruled by said District Court, whereupon plaintiff-in-error excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas. (Transcript, pp. 315 to 320.)

Subsequent to overruling the above motion for a new trial and before plaintiff-in-error had given its **supersedeas** appeal bond from said judgment against it, said District Court, upon motion of the State of Texas, filed in the main case, appointed a receiver of the property, assets and business of said Waters-Pierce Oil Company, situate in the State of Texas, to which action of said court this plaintiff-in-error duly excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. (Transcript, pp. 327 to 328.) The Court of Civil Appeals affirmed the judgment, decree and orders of the court below. (Transcript. p. 1162.)

In due time plaintiff-in-error filed with the Supreme Court of Texas its application for a writ of error to said Court of Civil Appeals, which said application was on February 26, 1908, refused by said Supreme Court of Texas. (Transcript, p. 1187.)

Whereupon, said Waters-Pierce Oil Company, plaintiff-in-error herein, applied for and obtained from this court a writ of error to said Court of Civil Appeals to review its judgment upon assignments of error which are substantially in part epitomized under the title of Points and Authorities.

POINTS AND AUTHORITIES.

1. **The Waters-Pierce Oil Company cannot be held liable and punished for the acts or engagements of the Standard Oil Company which it was under no legal duty to examine and could neither order, forbid nor control.**

Capitol Traction Company v. Offutt, 17 App. D. C. 292; 53 L. R. A. 390;
Durkin v. Kingston Coal Company, 171 Penn. 193; 29 L. R. A. 808;
U. S. Const., Sec. 10, Article I.
U. S. Const., Sec. 1, 14 Adm.

(*a*) **The capacity of the Standard Oil Company to acquire and hold the stock of the Waters-Pierce Oil Company must be determined by its charter, and the conditions of subscription and the nature of certificates of stock according to the law of the State wherein said Waters-Pierce Oil Company was created, to-wit: the State of Missouri, and not the State of Texas.**

Black v. Zacharie, 3 Howard, 483;
Meramec Mining Co. v. Levy, 54 Penn. State, 227; 93 Am. Dec. 697;
Ireland v. Globe Milling & Reduction Co. (R. I. 1895); 32 Atl. 921;
Greenwood v. Curtis, 6 Mass. 358;
Boatmen's Bank v. Gillespie, 209 Mo. 217, l. c. 256;
Trust & Savings Co. v. Home Lumber Co., 118 Mo. 459;
Bank v. Durfee, 118 Mo. 442;
Watson v. Woody Printing Co., 56 Mo. App. 151;
O'Brien v. Cummings, 13 Mo. App. 197;
Carroll v. Savings Bank, 8 Mo. App. 249;
U. S. Const., Sec. 1, 14 Amd.

(*b*) **If the holding of stock by the Standard Oil Company of New Jersey in the Waters-Pierce Oil Company was unlawful,**

it was an offense on the part of the holding company, and not of the company whose stock was so held, the acquisition of which it could neither lawfully forbid nor prevent.

Texas Anti-Trust Act, 1903, Sec. 2;
Northern Securities Co. v. U. S., 193 U. S. 197;
U. S. Const., Sec. 1, 14 Amd.

(*c*) **In declaring it unlawful for the Standard Oil Company to own stock in the Waters-Pierce Oil Company, the latter is not only deprived of its property without due process of law, and denied the equal protection of the laws, but such directly impairs the obligation of a contract, in that it denies a stockholder of the Waters-Pierce Oil Company the right to transfer his stock to whom he pleases.**

Trisconti v. Winship, 43 La. An. 45; 26 Am. St. Rep. 175.
McNulte v. Corn Belt Bank, 164 Ill. 427; 56 Am. St. Rep. 203;
Weston's Case, L. R. 4 Ch. App. 20;
Farmers' Loan & Trust Co. v. C. P. & S. Ry. Co., 163 U. S. 31;
Rice v. Rockefeller, 134 N. Y. 174; 30 Am. St. Rep. 658.

2. **To punish the Waters-Pierce Oil Company because part of its stock was held by the Standard Oil Company, the same having been acquired long before the passage of the Texas Anti-Trust Acts of 1903 and 1899, and when such acquisition was wholly lawful, is to subject the Waters-Pierce Oil Company to an *ex post facto* law and deprive it of its property without due process of law.**

U. S. Const. Sec. 10, Article 1;
U. S. Const. Sec. 1, 14th Amd;
Calder v. Bull, 3 Dallas, 386;
Fletcher v. Peck, 6 Cranch, 87;
Watson v. Mercer, 8 Peters, 88;
Coffin v. Rich, 45 Maine, 507;
American Building & Loan Assn. v. Rainboat, 48 Neb. 434;

Stevens v. Southern Pacific Co. 109 Calif. 86; 41 Pacific 783; 29 L. R. A. 751.

(*a.*) **The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.**

Huntington v. Attrill, 146 U. S. 657;
Wisconsin v. Pelican Ins. Co., 127 U. S. 265;
Boyd v. U. S., 116 U. S. 616;
Lees v. U. S., 150 U. S. 476;
U. S. v. Shapleigh, 54 Fed. Rep. 126;
Burgess v. Salmon, 97 U. S. 381;
U. S. v. Hughes, Fed. Cases No. 15,416;
Wilson v. Ohio Railroad Co., 64 Ill. 542;
Cooley, Const. Lim. (7th Ed.) p. 375. ff.

3. **The State of Texas cannot constitutionally enact a law which denounces as an offense an act committed in another state, and punish this plaintiff-in-error for an alleged offense, committed wholly outside of the jurisdiction of the State of Texas.**

The Appollon, 9 Wheaton, 362;
State v. Knight, (N. C., 1799) Taylor, 65;
In re Grice, 79 Fed. Rep. 627;
State v. Cutshall, 110 N. C. 538; 16 L. R. A. 130;
Allgeyer v. La. 165 U. S. 578;
Southerland, Stat. Const. (Lewis' edition) Vol. 1, Sec. 13;
Cooley, Const. Lim. (7th Edition) Page 176;
Story, Conflict of Laws, (1834) Sec. 620.

4. **The Waters-Pierce Oil Company cannot be held liable because of any alleged agreement between its predecessor, the old Waters-Pierce Oil Company, and the Standard Oil Company of New Jersey, solely on account of the purchase by the present Waters-Pierce Oil Company of its predecessor's business, property and good-will.**

Capitol Traction Co. v. Offutt, 17 App. D. C. 292; 53 L. R. A. 390;

Austin v. Tecumseh Nat'l. Bank, 49 Neb. 416; 68 N. Western, 628; 35 L. R. A. 444;
Wyman v. Hallowell, 14 Mass. 57; 17 Am. Dec. 194;
Bellows v. Hallowell & Augusta Bank, 2 Mason 31; Fed. Cases, 1279;
Gulf, Colo. & S. S. Railroad Co. v. Newell, 73 Texas, 334; 15 Am. State Rep. 788;
Houston Ice & Brewing Co. v. Stratton, 13 Tex. Cr. Rep. 887; 89 Southwestern 1111;
U. S. Const. Sec. 1, 14th Amd.

5. **Admitting the ownership of a portion of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey, this fact is not enough to establish the existence of a "combination" between the two corporations, within the meaning of that term as used in the Texas Anti-Trust Acts of 1899 and 1903, and to hold the Waters-Pierce Oil Company because of such ownership of stock by the Standard Oil Company guilty of entering into a combination with the Standard Oil Company, and punishing it therefor, is to deprive the Waters-Pierce Oil Company of its property without due process of law, deny it the equal protection of the laws, and hold it liable under *ex post facto* and retrospective laws.**

Commonwealth *ex rel.* v. Ponxsutawney Waterworks Co., 197 Pa. Stat. 569; 47 Atlantic, 843;
Gates v. Hooper, 90 Texas, 563; 39 Southwestern, 1079;
State v. Continental Tobacco Co., 177 Mo., 1; 75 Southwestern, 737;
U. S. Const. Sec. 1, Article 4;
U. S. Const. Sec. 10, Art. 1;
U. S. Const. Sec. 1, 14th Amd.

(*a*) **Nor does the fact of such ownership of a portion of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey warrant the conclusion that the Waters-Pierce Oil Company had brought its management and control under the management and control of the Standard Oil Company.**

6. **In the admission of incompetent, frivolous and immaterial evidence wholly foreign to any issues to the cause, arbitrarily admitted and without regard for the rules of law and constitutional rights of plaintiff-in-error to a fair and impartial trial of the issues raised, said evidence being calculated to excite, inflame and prejudice the minds of the jury against said plaintiff-in-error, the constitutional right of plaintiff-in-error to a fair and impartial trial was denied, and by the judgment upon the verdict in said cause plaintiff-in-error was deprived of its property without due process of law.**

Robinson, Am. Jurisprudence, Pages 238 to 57 to 59;
In re Ziebold, 23 Fed. Rep. 791;
Ex parte Va. 100 U. S. 346;
Bank of Columbia v. Oakly, 4 Wheaton, 235;
Cooley, Const. Lim. (7th Edition) Page 506;
Utah v. Bates, 14 Utah, 293; 47 Pacific 78; 43 L. R. A. 33;
San Jose Ranch Co. v. San Jose Land & Water Co., 126 Calif. 322; 58 Pacific, 824;
Pennoyer v. Neff, 95 U. S. 714;
U. S. Const. Sec. 1, 14th Am.

7. **The fine imposed is so grossly excessive as to deprive plaintiff-in-error of its property without due process of law.**

Cooley, Const. Lim. (7th Edition) Page 471;
Cutting v. Goddard, 183 U. S., l. c. 101;
Gates v. Hooper, 90 Texas, 563;
State v. Compress Co. 95 Texas, 603;
Ft. Worth & D. C. R. R. Co. v. State (Texas) 87 Southwestern, 336;
State v. Bates, 14 Utah, 293, 47 Pacific, 78, 43 L. R A. 33;
Texas Const. Sec. 13, Article 1;
U. S .Const. Sec. 1, 14th Amd.

(*a*) **In including penalties for Sundays, in the absence of proof showing the doing of business on such days, plaintiff-in-error is denied due process of law.**

8. The Texas Anti-Trust Acts of 1899 and 1903 are so vague, indefinite, ambiguous and uncertain in terms as to fail to designate any offense with such certainty as to inform the public in advance of the constituents of the offense sought to be defined and punished, and the punishment of this plaintiff-in-error under said statutes deprives it of its property without due process of law.

Augustine v. State (Texas), 52 Southwestern, 77;
Queen Ins. Co. v. State, 86 Texas, 250;
M. K. & T. Ry. Co. v. State (Texas), 100 Southwestern, 766;
Tozier v. U. S., 52 Fed. Rep. 917;
L. & N. Railroad Co. v. Commonwealth (Ky.), 35 Southwestern, 129;
Hughes Criminal Law, Sec. 2429;
Commonwealth v. Bradford, 9 Metcalf, 268;
Cutter v. State, 36 New Jersey Law, 125;
C. B. & Q. Railway Co. v. Chicago, 166 U. S. 226;
Hagar v. Reclamation District, 111 U. S. 701;
Niagara Fire Ins. Co. v. Cornell, 110 Fed. Rep. 816;
U. S. Const. Sec. 1, 14th Amd.

9. The denial of any period of limitation in bar of a suit against plaintiff-in-error to recover fines or penalties or forfeit its permit is a denial of the equal protection of the laws, and deprives plaintiff-in-error of its property without due process of law.

G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Cutting v. Goddard, 183 U. S. 79;
Ex parte Converse, 137 U. S. 624;

Under Article 219, Texas Code of Criminal Procedure;
Klepper v. State, 4 Texas, 242;
Cyc. Vol. 22, Page 186;
Stucksbury v. Swan, 85 Texas, 563;
M. K. & T. Ry. Co. v. State (Texas), 100 Southwestern, 766;

Commonwealth v. Equitable Life Assurance Co. (Ky.); 38 Southwestern, 491;
U. S. v. Shapleigh, 54 Fed. Rep. 134;
Ex parte Lange, 18 Wallace, 163.

Under Article 3354 Revised Civil Statutes of Texas;
Stockwell v. U. S. 13 Wallace, 531;
Davidson v. Mo. Pac. Ry. Co. (Texas), 3 Willson's Cases, 216;
Lockwell v. Ohio, 11 Ohio, 130;
Buswell on Limitation. Sec. 97.

Under Article 3358, Revised Civil Statutes of Texas;
Boswell v. Robinson, 33 New Jersey Law, 273;
Cooper v. Lee, 75 Texas, 114; 12 Southwestern, 483;
Tevis v. Armstrong, 71 Texas, 59;
Railway v. Titterington, 84 Texas, 218;
Blount v. Bleker, (Texas), 35 Southwestern, 863.

10. **The appointment of a receiver and transfer to him of the property of plaintiff-in-error pending proceedings by way of appeal was wholly without authority and an arbitrary exercise of judicial power, and deprived plaintiff-in-error of its property without due process of law, and denied it the equal protection of the laws.**

Pomeroy, Equity Jurisprudence, Sec. 1330 and Equitable Remedies, Sections 62, 118, and 71;
Ry. Co. v. Jackson, 85 Texas, 605;
Havemeyer v. Superior Court, 84 Calif. 327; 24 Pacific, 121, l. c., 134, 135;
Revised Statutes of Texas, Articles 1177, 1181, 1191 and 1337;
Hall v. Jackson, 3 Texas, 305;
Nye v. Gribbell, 70 Texas, 458;
May v. Taylor, 22 Texas, 348;
Mann v. Falcom, 25 Texas, 276;
Bledsoe v. Wills, 22 Texas, 650;
U. S. Const. Sec. 1, 14th Amd.

(a) The appointment of a receiver of plaintiff-in-error's property for the purpose of depriving it of the capacity for further or continued violation of the anti-trust laws of Texas without evidence of any such intended violation, and without evidence that it could not use its said property in compliance with law, constitutes a deprivation of said property of plaintiff-in-error without due process of law.

Windsor v. McVeigh, 93 U. S. 274;
Ex parte Lange, 18 Wallace, 163;
Bigelow v. Forrest, 9 Wallace, 351;
Hovey v. Elliott, 167 U. S. 409.

11. The Texas Act of April 11th, 1907, is null and void.

(1.) In so far as it attempts to create a lien upon the property of plaintiff-in-error for acts committed before said Act took effect.

(2.) In so far as under it, the right to appoint a receiver is limited to suits against corporations only.

(3.) In so far as it attempts to create a lien upon the property of plaintiff-in-error, in that the lien is not created by the terms of the act, based alone upon the commission of the offense, but is left to be created by the action of the prosecuting officer in filing suit to recover the prescribed penalties.

Calder v. Bull, 3 Dallas, 388;
Cummings v. Missouri, 71 U. S. 277;
Fletcher v. Peck, 6 Cranch, 137;
Wilson v. O. & M. Railroad Co., 64 Ill. 542; 16 Am. Rep. 565;
Havemeyer v. Superior Court, 84 Calif. 347; 24 Pacific, 121;
Jackson v. Trunk Railroad Co., 85 Texas, 605;
G. C. & S. F. Railroad Co. v. Ellis, 165 U. S. 150;
Mayor of Baltimore v. Radecke, 49 Maryland, 217; 33 Am. Rep. 239;
Yick Wo v. Hopkins, 118 U. S. 266;
Barbier v. Connelly, 113 U. S. 27.

ARGUMENT.

I.

THE WATERS-PIERCE OIL COMPANY CANNOT BE HELD LIABLE AND PUNISHED FOR THE ACTS OR ENGAGEMENT OF THE STANDARD OIL COMPANY, WHICH IT COULD NEITHER ORDER, FORBID OR CONTROL.

As self-evident and incontrovertible as the above proposition would seem to be, the record in this case clearly shows that the foundation upon which the State of Texas built its prosecution of the Waters-Pierce Oil Company in this suit, consists wholly in an absolute negation of this proposition. Everything alleged to have been done by plaintiff-in-error in violation of the Anti-Trust Laws of Texas, every act alleged to have been committed, and for which plaintiff-in-error stands convicted, is referred back in every instance to the one fact insistently alleged by the State (and freely admitted by plaintiff-in-error), that the Standard Oil Company had acquired and owned a majority of the stock of the Waters-Pierce Oil Company; and for this grievious sin an enormous fine is imposed and its valuable business in the State of Texas destroyed at one blow, by the cancellation of its permit.

In the 11th paragraph of the trial court's charge to the jury, this language is employed (Record p. 1148):

> "If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 30, 1903, or any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and **thereby effected a combination of said two corporations,** and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in

Texas of the character and kind of oil above mentioned or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the State and say by your verdict: We, the jury, find for the State on the issues submitted for our consideration in paragraph 11 of the court's charge. In this connection, you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the Anti-Trust Laws of Texas.

If you do not find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and if you do not further find from a preponderance of the evidence that said stock was acquired and combination effected, if it were at all, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of said character and kind of oil or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will say by your verdict, we, the jury, find in defendant's favor on the issues submitted for our consideration in paragraph 11 of the court's charge."

The above is a fair sample of the attitude assumed both by the State of Texas in its petition and by the trial court in the trial of said cause. The underlying idea, as exhibited by the record, is clearly that in the mind of the court the simple fact that the Standard Oil Company had at some time in the past acquired and at the dates above mentioned owned a portion of the stock of the Waters-Pierce Oil Company, was in and of itself enough to convict the Waters-Pierce Oil Company of a violation of the Anti-Trust Laws of the State. Not one single shred of evidence can be found in the voluminous record herein to indicate, even remotely, that the acquisition of said stock by the Standard Oil Company was with the knowledge or con-

sent of the Waters-Pierce Oil Company or that such acquisition could in any manner have been prevented by it. On the contrary, the uncontradicted evidence shows that the stock in the old Waters-Pierce Company, the predecessor of this plaintiff-in-error, was originally acquired, many years before the filing of this suit, by purchase from some of the stockholders of the old Waters-Pierce Company, and that upon the dissolution of that company in 1900, and the distribution of its assets, among its then existing stockholders, the present Waters-Pierce Oil Company, which succeeded to the property and good-will of its predecessor, purchased the same from the owners thereof, and the stock of the new company in that transaction given to the Standard Oil Company was naught but the legitimate exchange of one valuable property for the other, to-wit: the stock of the new company for the interest of one stockholder as tenant-in-common with the other stockholders of the property of the old Waters-Pierce Company which had been dissolved.

There is absolutely nothing in the record to show that this plaintiff-in-error was in a position to forbid or prevent the Standard Oil Company acquiring a portion of its stock. There is nothing to show that that acquisition was unlawful, but, on the contrary, the charter of the Standard Oil Company, as the record shows, distinctly gave it the right to acquire, own and hold stock in other corporations. Whether the exercise of this power was lawful or unlawful in the State of Texas is outside the question, for that power never was exercised in the State of Texas. The stock of the Waters-Pierce Oil Company was acquired by the Standard Oil Company in the State of Missouri, where the former corporation was domiciled.

But, admitting even, for the sake of argument, that the acquisition of stock of one corporation by another corporation is unlawful, it surely cannot be urged that this will furnish ground for criminal charges against the corporation whose stock is so acquired.

There are some things so deeply written in the natural spirit of justice in the human race that we need not seek for them in

written law or constitution, and no principle would seem to be more deeply founded in justice and right than this, that no man shall be called upon to answer for any but his own acts, or at most, for those of others which he could either legally control or prevent. The most despotic monarch has never dared to assert a contrary principle. And surely, in this land of ours, in a government erected by the people, for the protection of their rights and their liberties, this principle must be recognized to its fullest extent.

It is not to be wondered, therefore, that few cases can be found either in the English or American courts in which this point has ever been directly raised. The question involved here is perhaps rather one dealing with the philosophy of government than with the science of law as interpreted by the courts, and yet, every great constitutional question which has come before the courts of this land, especially those which have been the subject of such careful investigation by this court and in which the question of "due process of law" has been presented, has almost invariably given rise to some expression on the part of the eminent expounders of the constitution emphasizing the fact that the "law of the land," secured to the Anglo-Saxon race even before the days of Magna Charta, seeks to hold no man liable save for his own acts or omissions, or those which he was under legal duty to control or prevent and where the means and opportunity to exercise the duty was given.

The question here involved has been presented to the courts in one way on numerous occasions, namely: in the matter of the succession of one corporation to the property or business of another; and the rule of law established in those cases that there is no liability on the part of the successor corporation, which in good faith and for value has purchased the property of its predecessor, for the latter's torts or contracts has become so firmly established and so universally recognized that comment upon it would seem superfluous.

In the **Capitol Traction Company v. Offutt** (17 App. D. C. 292; 53 L. R. A. 390), in discussing the question of the liability

of such successor corporation, the court, speaking through Morris, J., uses this language:

> "The assignments of error are exceedingly numerous, amounting to seventy-seven in all, but we do not deem it necessary to consider all of these or, indeed, more than one of them, for we are of the opinion that this suit cannot be sustained against the Capitol Traction Company for the alleged delinquency of the Washington & Georgetown Railroad Company. **We know of no rule or principle of the common law that would authorize suit to be maintained against one person who is *sui juris* for the default of another person who is equally *sui juris* whether the persons be natural persons or corporations, for one corporation can no more be held for the default of another corporation than can one natural person for the default of another natural person.**"

In **Durkin v. Kingston Coal Co.,** (171 Penn. 193; 29 L. R. A. 808), the question was presented to the Pennsylvania Supreme Court of the liability of the Coal Company for injuries received by plaintiff, caused by the negligence of a mine boss whom the mine owner, by statute, was compelled to employ, and with whose acts he could not interfere, his duties being prescribed by the Act. In holding the imposition of liability upon the mine owner for the negligence of such foreman unconstitutional and void the court, speaking through Williams, J., uses the following language:

> "Incredible as it may seem, obedience on the part of the mine owner does not protect him, but if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all of the consequences of the incompetency of the representative of the State. **This is a strong case of binding the consequences of the faut or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civl responsibility without blame for the fault of another.**"

In **Commonwealth *ex rel.* v. Pouxentawney Water Works** (197 Pa. St. 569; 47 At. 843), it was sought to forfeit the charter of defendant because it had transferred its property and franchises to the Lindsey Water Company and thereby rested in

the latter company the management and control of the defendant. Proof offered to sustain the allegations consisted of evidence of the fact that by purchase from the stockholders of the defendant company, the Lindsey Water Company had acquired a majority of the stock of the defendant. In refusing to hold defendant liable, the Supreme Court of Pennsylvania, speaking through Brown, J., says:

> "What the majority of the stockholders did was to sell their stock, as was their right, and through the purchasers it passed into the control of the Lindsey Water Co. * * Though such sales may give to the Lindsey Water Co. subquently acquiring the stock, a controlling interest in the Pouxentawney Water Works, the **latter could not have prevented the sales, and not having been a party to them, is not accountable for them or for their effect.** * * * * No misconduct of the Lindsey Water Co., and nothing that one or more of the majority of the stockholders of the defendant water company may have done in disposing of their stock, **can be charged to it. If it is to be punished, it must be for its own sins and not for those of another."**

From the above it will be seen that the courts admit, without discussion almost, the truth of the proposition that the right to be held responsible only for one's own acts or omissions or for those of others over whom one has some legally recognized control is fundamental. This is not a right born of any particular system of law, but is imbedded and inherent in human nature itself. Nor can it be conceived that the consent of the individual, upon which government alone is based, could ever be construed to yield or surrender this right to any government. If there ever was a "natural law," surely this is one and the fact that the books reveal so few cases in which this proposition has ever been squarely presented to the courts is a strong argument in favor of its axiomatic nature. As well raise the question whether a man is entitled to defend his own life. It is a "self-evident truth," included in the "right to life, liberty and the pursuit of happiness," the foundation stone upon which our constitution and government rests. No man ever surrendered to any government authority for the imposition of vicarious punishment. No despotism ever claimed its surrender.

The section of the law in regard to which the instruction of the court above noted was given to the jury, is section 2 of the Act of March 31, 1903, which provides:

> "That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:
> (1.) * * * * * * * * * *
> (2.) Where any corporation acquires the shares of certificates of stock or bonds, franchises or other rights or the physical properties or any part thereof of any other corporation or corporations for the purpose of preventing or lessening competition or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

Examining the charge of the court in the light of the above, it is evident that the court gave to this act an *ex post facto* operation in that it made the question of defendant's guilt or innocence under said Act of March 31, 1903, depend upon the purpose and intention on the part of the managing officers and directors of the Standard Oil Company of New Jersey in doing an act, to-wit: purchasing the stock of this plaintiff-in-error long prior to the taking effect of said Act of March 31, 1903, contrary to the provisions of paragraph 1, section 10, article 1 of the Constitution of the United States. It was not only shown by the evidence introduced at the trial of said cause but was plainly alleged in the petition on the part of the State of Texas that the Standard Oil Company of New Jersey on May 29, 1900, acquired and since that date had continuously owned a majority of the capital stock of the Waters-Pierce Oil Company. Notwithstanding this, however, it is attempted to assert a liability under the Act of 1903, for acts done and intentions formed at least three years prior to the passage thereof.

(*a.*) THE CAPACITY OF THE STANDARD OIL CO. TO ACQUIRE AND HOLD THE STOCK OF THE WATERS-PIERCE OIL COMPANY MUST BE DETERMINED BY ITS CHARTER AND THE CONDITIONS OF SUBSCRIPTION AND NATURE OF THE STOCK CERTIFICATES

UNDER THE LAW OF THE STATE WHEREIN THE WATERS-PIERCE OIL CO. WAS CREATED, TO-WIT: THE STATE OF MISSOURI, AND NOT THE STATE OF TEXAS.

It is a rule well-recognized in corporation law that the law of the corporation's domicile governs exclusively in all matters affecting its creation, organization and internal management. "The validity and effect of a transfer of shares are governed by the laws of the state or country in which the corporation was created, although the transfer may be made in another state or country and both of the parties may reside there." (Marshall on Corporations, p. 805.)

In **Black v. Zacharie** (3 Howard, 483), Mr. Justice Story lays down the following rule:

> "From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily like every other attribute of a corporation to be governed by the local law of that state and not by the local law of any foreign state."

In **Meramec Mining Company v. Levy,** (54 Penn. St. 227; 93 Am. Dec. 697), the plaintff, a Michigan corporation, brought suit to recover from an original subscriber the instalments on the stock called since he became a stockholder, and, in deciding the question involved, the Pennsylvania Court clearly recognized the above doctrine by declaring that in determining the duties and obligations of stockholders in the Michigan Company, the court would be guided by the ruling of the Michigan Court.

In **Ireland v. Globe Milling & Reduction Co.** (R. I. 1895), 32 Atl. 921, the Supreme Court of Rhode Island, in passing upon the question as to the situs of stock for the purpose of attachment, uses the following language:

> "The situs of the stock for the purpose of attachment and execution is the domicile of the corporation and that place only." (Citing Cook S. & S., 3rd ed. paragraph 485, and cases cited, and Plimpton v. Bigelow, 93 N. Y. 592, 23 Am. & Eng. Enc. of Law, 632, and cases cited. Win-

slow v. Fletcher, 53 Conn. 394.) "And a corporation can have but one legal residence and that must be within the state or sovereignty creating it, although by comity it may be allowed to do business through its officers and agents in other jurisdictions."

Judge Lowell, in his able treatise on the Law of Stocks, paragraph 50, declares that:

"Whatever the general principles of international law in relation to assignment of personal claims may be, the validity of a transfer of stock is governed by the law of the place where the corporation is created."

And this principle is distinctly recognized in Masury v. Ark. National Bank (87 Fed. Rep. 381), in which it is distinctly held that unless the transfer of the stock in question is valid under the laws of Arkansas, (the state which created the corporation) the laws of the state where the transfer was itself actually made cannot control.

From the above authorities, the conclusion would seem to be inevitable that it is beyond the constitutional powers of a state to declare who shall or shall not be qualified to own and hold stock in a corporation chartered in a foreign state, and especially, as in this case, to attempt to regulate or prohibit such stock ownership on the part of persons wholly outside the jurisdiction of the state.

No question is raised here as to the right of a state to declare as a condition precedent to admission of a foreign corporation who shall or shall not be stockholders therein, or even to make the continued right of the foreign corporation to do business within the state dependent upon such conditions subsequently enacted and declared, but it is contended that no power is given a state to determine the qualifications of stockholders in a corporation organized in a foreign state.

In this connection, the case of **Greenwood v. Curtis,** 6 Mass., 358, is not without considerable weight. The action was one of assumpsit on a promissory note for the delivery of slaves and the payment of "bars," an African currency. The note was made at Rio Pongos on the coast of Africa for the delivery of

slaves there on demand. The action on the note was brought in Massachusetts, where contracts of this sort were wholly and and entirely unlawful. In answer to the argument urging the invalidity of such a contract in Massachusetts, Judge Story uses the following language:

> "By the common law upon principles of national comity, a contract made in a foreign place and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this state; although such contract may not be valid by our laws or even may be prohibited to our citizens."

The above case is referred to primarily for the purpose of showing how deeply rooted in our system of jurisprudence is the rule that contracts, if valid where made, are valid everywhere. As bearing upon the case at bar, if the acquisition of the stock of the Waters-Pierce Oil Company by the Standard Oil Company is looked upon solely from its contractual side then it is obvious that the law of the State of Missouri alone can govern.

There is nothing whatever in the law of the State of Missouri which in any manner forbids, prevents or limits the right of the owner of stock in a corporation selling such stock to whomsoever he pleases; while it is true that the right of such purchaser to exercise the privileges and rights of the stockholder in such corporation may be questioned under circumstances, this nevertheless remains as an established principle of law in the state, that such limitations or restrictions can and do affect only the vendee and not the vendor of the stock.

Section 965 of the Revised Statutes of the State of Missouri, 1899, reads as follows:

> "The stock of every company formed under this article, providing or the organization and general powers, duties and liabilities of corporations with incidental matters of practice, shall be deemed **personal estate** and shall be transferable in the manner prescribed by the by-laws of the company; but no shares shall be transferred until all previous calls thereon shall have been fully paid in."

Such has been the law in Missouri with respect to the status of stock in a corporation ever since the organization of the state, and time and again the courts of the state have denied the right to limit, obstruct or forbid the free transfer of stock upon the ground that this would constitute an unlawful restraint in the freedom of alienation of property. To all intents and purposes, corporation stock has been practically treated as negotiable paper. Says the Missouri Court of Appeals, in **Watson v. Woody Printing Co.**(56 Missouri Appeals, 151).

> "Stock in a corporation is personal property and the certificate is only evidence of the title thereto. The stock certificates are the declarations in writing by the company's officers as to who are entitled to participate in its benefits—its profits or losses, the latter being limited by the extent of stock owned. They are not negotiable paper in the sense in which the term is applied to commercial notes, bonds and the like, but the stock is considered transferred when a certificate is assigned, thus differing from other muniments of title."

In **Bank v. Durfee,** (118 Mo. 442), the Supreme Court of Missouri, again declaring corporation stock to be personal property and the right of alienation to be incident thereof, held that the by-law which provided that no transfer of stock should be allowed or valid as long as the holder was in arrears to the corporation, and whereby a lien was reserved on the stock to secure any debt of the stockholder, was in restraint of trade, against public policy, and therefore void.

In the leading case of **Trust & Savings Company v. Home Lumber Company** (118 Mo. 459), the Supreme Court had occasion to re-examine the freedom of alienation of stock, and after re-affirming all that had been heretofore said by the courts of the state, as shown in the above citations, further declared that unless some restriction was placed upon the transfer of stock, by the public law of the state, or the owner of the stock was bound by some valid restrictive contract of which the purchaser had notice, the latter who bought in good faith and for consideration could not be held bound by any restriction or lien of which he did not have notice.

The most recent discussion of this question appears in the **Boatmens Bank v. Gillespie,** (209 Mo. 217), decided in 1907. Questions very similar to the questions at bar were raised in the Missouri case. The legal existence of the corporation was attacked, among other grounds upon this, that the persons who signed the articles of incorporation, or at least a majority of them, were residents of Kansas, and not of Missouri, and that the charter was procured in Missouri for the purpose of evading the liability of stockholders under the Kansas law. In commenting upon this proposition, the Supreme Court of Missouri, speaking through Burgess, J. says:

> "The evidence shows that the corporation did but a small portion of its business in Kansas City. Besides we understand it to be a universal doctrine that where citizens of one state desire to do business under a charter obtained in another state whose corporation laws seem to them more favorable than the laws of the state in which they resided, they have the right to do so upon compliance with the laws of such other state. **There is nothing in our laws which forbids citizens of this state who have incorporated here to sell all their stock to non-residents."**

From the above, it would seem clearly apparent that there was nothing in the law of the State of Missouri, in which said plaintiff-in-error was organized, forbidding or preventing it from selling any portion of its stock to the Standard Oil Company of New Jersey, if it had chosen to do so. With respect to this point, however, the record clearly shows that this stock was originally acquired by the Standard Oil Company, not from the Waters-Pierce Company, but by the purchase and assignment from some of the stockholders of the latter company.

The record further shows that the Standard Oil Company of New Jersey possessed complete and adequate authority under its charter to purchase the stock or any portion thereof of the Waters-Pierce Oil Co. although it is submitted that the use or abuse of its powers by the Standard Oil Company can hardly be drawn into question here.

(*b.*) IF THE HOLDING OF STOCK BY THE STANDARD OIL COMPANY OF NEW JERSEY IN THE WATERS-PIERCE OIL COMPANY OF MISSOURI WAS UNLAWFUL, IT WAS AN OFFENSE ON THE PART OF THE **HOLDING COMPANY,** AND NOT OF THE COMPANY WHOSE STOCK WAS SO HELD, THE ACQUISITION OF WHICH IT COULD NEITHER FORBID NOR PREVENT.

Paragraph 2 of section 2 of the Act of March 31, 1903, above quoted, defines a monopoly as a combination or consolidation of two or more corporations when effected (among other methods) by the acquisition of the shares or certificates of stock, etc., of another corporation, for the purpose of preventing or lessening competition, etc.

The plain language of this provision of the statute can be susceptible of no other construction than that, if it defines any offense at all, it makes the offense consist of **acquiring** the shares or certificates of stock of another corporation—an offense by the corporation so acquiring such shares or certificates of stock, and not an offense by the corporation whose shares of stock are so acquired. The combination or consolidation is therefore under the terms of the Act effected only by the act of the acquiring corporation.

It is apparent that all the evils sought to be prevented in the above act could be accomplished without the knowledge or consent of the corporation whose shares or certificates of stock were thus acquired, and without the knowledge or consent of the other stockholders. Under the instructions of the trial court and in the interpretation of the law by the Court of Appeals, the corporation whose shares of stock were thus acquired without its knowledge and without the knowledge of the other stockholders is subjected to the penalties provided by the Act, and innocent stockholders made to suffer with the guilty corporation whose **act and purpose** in acquiring the stock alone constitutes the gravamen of the offense.

To illustrate this contention, it being admitted as true, that a corporation cannot prevent its individual stockholders from transferring their certificates of stock to such persons or cor-

porations as they may see fit, if the corporation desiring to acquire a majority of the stock of another corporation for the purpose of affecting or lessening, or even destroying, competition should constitute certain persons its agents for the purpose of buying such stock, go into the open market and buy the same or by separate private contracts and for valuable consideration purchase the holdings of respective stockholders, taking the transfers in the names of such agents as trustees for the acquiring corporation and keeping the fact of the beneficial ownership of the acquiring corporation in such stock absolutely concealed from every stockholder of the other corporation and from all its officers and directors—if the ruling of the court below be correct, the corporation whose stock is so acquired is guilty of an offense, although it did not commit the offense and did not even know that it had been committed, contrary to the fundamental and well-recognized principle of justice and right which declares that no one shall be punished for the commission of an act for which he is in no wise responsible. It is certainly something new in criminal jurisprudence for a court to hold that A can be punished for an act committed by B, when A. was wholly ignorant of the commission of the act and in no way knowingly contributed to its commission. If the law as interpreted by the court below is correct and if it be true that the question as to whether or not the corporation whose stock is acquired by another corporation is guilty of an offense can be made to depend solely and alone upon the purpose had by such other corporation then so acquiring such stock, then, the corporation whose stock is so acquired can be made to suffer the penalties imposed by the act by the other corporation acquiring even less than a majority of the stock with the purpose and intention of forming a combination with other individual stockholders so as to obtain control of the corporation and affect or lessen competition. Now, in such a case, even if the managing officers and directors of the corporation whose stock is thus acquired are cognizant of the fact that the other corporation has acquired a majority of its stock, can it be held under any principle of law or justice that the

corporation whose stock has been so acquired would be guilty of an offense without anything done by it to contribute to such acquisition, without even knowing the purpose and intent of such acquisition by such other corporation?

In answer to the above argument, it may be contended on behalf of the State of Texas, that the acquisition by the Standard Oil Company of New Jersey of a majority of the stock of the Waters-Pierce Oil Company was made with the knowledge and consent of all the stockholders of the latter corporation. Admitting this, for the sake of the argument, to be true, we nevertheless contend that whether or not the Waters-Pierce Oil Company thereby became guilty of an offense cannot be made to depend upon the purpose and intention of the managing officers and directors of the Standard Oil Company, as the trial court instructed the jury and the appellate court interpreted the law. Admitting that the Waters-Pierce Oil Company and its stockholders actually knew of such acquisition, they could very easily have been wholly ignorant of the purpose and intention of the Standard Oil Company to affect or lessen competition by such acquisition of stock, if such was its intention. Mr. Pierce, tendered as a witness for the State of Texas, was the only witness who testified with reference to this question and he testified that when this plaintiff-in-error was formed and organized, the officers composing the Standard Oil Company of New Jersey agreed that he, Mr. Pierce, should manage the Waters-Pierce Oil Company without any interference, dictation or control by the Standard Oil Company. No evidence appears in the record to contradict this; on the contrary, all the officers of the company, whose testimony was offered in evidence by the State, confirmed Mr. Pierce's statement in every particular in declaring that at no time—with the exception of the brief period mentioned by Mr. Pierce—was the company managed or controlled by any one but Mr. Pierce and his chosen officers and agents. Now, taking this statement as true, if the secret purpose of the officers and agents of the Standard Oil Company of New Jersey was to violate the agreement made with Mr. Pierce and to

utilize the acquisition of stock in the Waters-Pierce Oil Company to prevent or lessen competition in the sale of oil in Texas, the Waters-Pierce Oil Company, under the charge of the trial court and the interpretation of the law in the appellate court, would be held guilty under the Act, however ignorant Mr. Pierce and the other officers of plaintiff-in-error may actually have been with respect to the real purpose and intent of the Standard Oil Company, and however much they may have trusted in the good faith of the officers of that company in promising and agreeing that no attempt would be made on the part of the Standard Oil Company to interfere with Mr. Pierce's management and control of plaintiff-in-error. The agreement to which Mr. Pierce testified was by no means an unusual one. Under the facts as shown by the record, the Waters-Pierce Oil Company was doing a large and profitable business, a business built up by years of painstaking effort by Mr. Pierce, and Mr. Pierce could very easily have believed that the Standard Oil Company would be satisfied with the dividends which would accrue to it as a stockholder and that they would not attempt to do what they had promised not to do—interfere with his management or control. Under all the facts and circumstances, the agreement was a perfectly natural and reasonable one.

There is nothing in the record to show that the acquisition of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey, was effected by anything in the nature of a voluntary sale of said stock to the Standard Oil Company, by the Waters-Pierce Oil Co., but on the contrary, the uncontradicted evidence conclusively shows that the entrance of the Standard Oil Company into the affairs of the old Waters-Pierce Oil Company was brought about entirely by the action of certain stockholders of the latter company in selling their stock to the Standard Oil Company or transferring it to the trustees under the Standard Oil Trust Agreement, a thing which, so far as the law of the State of Missouri (wherein the old company was organized), is concerned, was wholly lawful. As hereinafter more clearly pointed out, upon the

dissolution of the old company, the various stockholders thereof became tenants-in-common of its property, both tangible and intangible, and were as legally qualified to dispose thereof in such manner and form as they saw fit, as was the holder of any personal property in the State of Missouri. The uncontradicted evidence shows that upon the organization of the present Waters-Pierce Oil Company, Mr. Pierce himself subscribed for all of the stock and paid therefor himself, and that thereafter he purchased the interest which the Standard Oil Company had in the property of the old Waters-Pierce Oil Company, paying therefor in stock, and then turned that property over to the present Waters-Pierce Oil Company, taking in payment therefor, the notes of the company which were subsequently liquidated.

Whatever view may be taken of the transaction or transactions through which the Standard Oil Company of New Jersey was vested with the ownership of the majority of the stock of the present Waters-Pierce Oil Company, this fact (as we have above pointed out) must not be overlooked, namely, that so far as the vendor of that stock—be it the Waters-Pierce Oil Company or Mr. Pierce—was concerned, the right to sell the same to anyone who would buy was unquestioned. Certainly when by the law of the State where the corporation is created the freedom of alienation of stock is emphatically recognized, it can hardly be contended that a foreign state in which said corporation does business can declare that to be a crime and punishable offense, which by the law of the corporation's domicile is valid and authorized.

From the above, the conclusion seems irresistible that if any offense has been committed under the above Act, it is an offense on the part of the Standard Oil Company and not on the part of the Waters-Pierce Oil Company.

(*c.*) IN DECLARING IT UNLAWFUL FOR THE STANDARD OIL COMPANY TO OWN STOCK IN THE WATERS-PIERCE OIL COMPANY AND PUNISHING THE WATERS-PIERCE OIL COMPANY ON ACCOUNT OF

SUCH OWNERSHIP, THE LATTER IS NOT ONLY DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED THE EQUAL PROTECTION OF THE LAWS, BUT SUCH LAW DIRECTLY IMPAIRS THE OBLIGATION OF A CONTRACT IN THAT IT DENIES A STOCKHOLDER OF THE WATERS-PIERCE OIL COMPANY THE RIGHT TO TRANSFER HIS STOCK TO WHOM HE PLEASES.

A stockholder in a corporation has an absolute right, prior to the dissolution of the corporation, to transfer his shares to whomsoever he may see fit, provided the transfer is **bona fide** and to a person having capacity to assume the obligations of a stockholder, unless such right is restricted by the charter of the corporation or some statutory provision, by a valid by-law or by a valid agreement with the corporation, and he cannot be deprived of this right by the corporation or the other stockholders without his consent. (Marshall on Corporations, paragraph 314; 1 Cook on Corporations, paragraph 12 and paragraph 331.)

In the latter authority above cited, Mr. Cook declares, "that shares of stock in a corporation are transferable the same as other personal property and that this is a principle of law coeval with the principle of stock itself."

As has already been pointed out, the right to transfer shares is given and subject to regulations and limitation only by the law of the state by which the corporation was created.

There are numerous cases, both in America and England, in which this question in one form or another has been presented to the courts, and the rule as above laid down has been uniformly recognized. The conclusion therefrom is that a stockholder, having once gained title to the stock of a corporation, stands in a relation of contract to that corporation in that no limitation may be placed upon his freedom of alienation of such stock without his consent, and in a like contractual situation with respect to the state, and from both situations there arises a duty on the part of the corporation whose stock he holds, as well as upon the state which created the corporation, to enact no rule, regulation

or law without his consent which shall in anywise abridge or limit this freedom of alienation which was a part of the property right in his stock when he acquired the same. Any law, therefore, of the state, the effect of which is to place a limitation or restriction upon this freedom of alienation, is within the prohibition of the Federal Constitution, in that it plainly interferes with the obligation of the contract between the stockholder and the corporation—if not between him and the state—through which arises and is secured the absolute freedom of alienation of his stock to whom he pleases.

The courts have always been jealous in their protection of this right of the stockholder to dispose of his stock when and how and to whom he pleases, and in a multitude of cases have declared that by-laws of the corporation restricting this right—by-laws which were in existence even when the stock was sold to the stockholder originally—were void, in that they constituted an unreasonable and evident restraint upon the alienation of property and in that respect were contrary to public policy.

Moore v. Bank of Commerce, 52 Mo. 377;

In re Klous, 67 Wis. 401;

Brinkerhoff-Farris Trust & Saving Co. v. Home Lumber Co. 118 Mo. 447;

Feckheimer v. National Exchange Bank of Norfolk, 79 Va. 80.

In **Trisconi v. Winship,** (43 La. Annual 45, 26, Am. St. Rep. 175,) the Supreme Court of Louisiana held that as a general rule stockholders indisputably have the right to sell their shares at pleasure, and in the Victor G. Bloede Co. v. Bloede, (84 Md. 129-142, 57 Am. St. Rep. 373,) the same principle was enunciated and applied.

In **McNulte v. Corn Belt Bank,** (164 Ill. 427; 56 Am. St. Rep. 203,) the Supreme Court of Illinois, speaking through Magruder J., declared that a by-law which attempted to restrain freedom of alienation of stock was illegal and void.

> "Not only because it seeks to keep the future action of the stockholders in reference to the increase of the stock in subjection to the original directors who passed the by-laws,

but also because it attempts to limit the right to sell or transfer stock by imposing unreasonable conditions. **Shares of stock in a corporation are as transferable as any other kind of personal property: and all unreasonable attempts to restrain the right to transfer such shares are void as being against public policy."**

(Citing 1, Cook on S. & S, sec. 331.)

In **Weston's Case** (L. R. 4 Ch. App. 20), this question of the right of alienating shares at will was squarely presented to the English Court of Appeals, in Chancery, and the same principle was recognized as being fundamental in the English law. The language of Sir W. Page Wood, L. J., is pertinent to the case at bar. He says:

> "It would be a very serious thing for the shareholders in one of these companies to be told that the shares, the whole value of which consists in being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles.

Applying this language to the case under discussion, we may well say that it would be a very serious thing for the shareholders in the Waters-Pierce Oil Company to be told that their shares were subject to a law of the State of Texas restricting the alienation thereof, especially when such law had been enacted long after such shares had been acquired and by a state in which the company was not organized or chartered nor in which any of its stockholders are or were domiciled but which state had the power—we do not say the right—to punish the Waters-Pierce Oil Company and through it every shareholder therein, because such shares had been acquired by persons or corporations contrary to the will of the State of Texas. The mere statement of such a proposition is in itself a sufficient answer to it.

The plain effect of the statute, in the preceding paragraph of this argument referred to, as interpreted both by the trial and appellate court of Texas, is to punish the innocent stockholders of a corporation because one stockholder has transferred his stock to some person or corporation contrary to the law of a foreign state, and this punishment is imposed in the

nature of a heavy fine, the payment of which means an equivalent reduction of assets of the corporation and of the value of every share of stock, thus directly affecting the value of every share of stock outstanding, and, consequently, the property of every stockholder.

Such a law distinctly impairs the obligation of the contract between the stockholder and the corporation when he bought his stock, which obligation adheres to the stock into whosoever hands it comes.

We wish to be clearly understood in our contention in this respect. We do not assert that it is not within the power of the State of Texas to place limitations upon the alienation of stock as a condition precedent to a foreign corporation coming within the state and doing business, or even after such foreign corporation has come in to create such a condition as a precedent requirement for its future continuation in business. We willingly concede this, but with that admit only the right of the state to forbid the entrance of the corporation or to cancel its right to continue in the state, in the event that such conditions are not complied with. The question above presented is a far different one. The point there involved is primarily this: can the State of Texas, or any other state, enact a law, the effect of which is to render that unlawful which prior to such enactment was lawful—take away the property of a corporation, diminish the value of stock in the hands of every stockholder for acts which neither the corporation nor the stockholders could prevent, as punishment for the exercise of a right well recognized and universally admitted.

II.

TO PUNISH THE WATERS-PIERCE OIL COMPANY BECAUSE PART OF ITS STOCK WAS HELD BY THE STANDARD OIL COMPANY, THE SAME HAVING BEEN ACQUIRED LONG BEFORE THE PASSAGE OF THE TEXAS ANTI-TRUST ACTS OF 1903 AND 1899 AND WHEN SUCH ACQUISITION WAS WHOLLY LAWFUL IS TO SUBJECT THE WATERS-PIERCE OIL COMPANY TO AN EX POST FACTO AND RETROSPECTIVE LAW AND DEPRIVE IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The old Waters-Pierce Company was incorporated in 1878, and obtained a permit to do business in the State of Texas, on or about July 6, 1889, which permit was cancelled on May 31, 1900. This company dissolved under the law of the State of Missouri in May, 1900, and the present Waters-Pierce Oil Company, plaintiff in error, was formed and took over for value the property and good will of its predecessor, purchasing the same from the owners thereof, viz., the stockholders of the old Waters-Pierce Company. At the time of the dissolution of the old Waters-Pierce Company, the Standard Oil Company of New Jersey owned 2750 shares of the stock of that company, and upon the incorporation of the present Waters-Pierce Oil Company, 2748 shares of stock of said company was transferred to the Standard Oil Company of New Jersey in exchange for its right, title and interest as stockholder in and as tenant-in-common of the surplus assets of the defunct Waters-Pierce Company. At the time when the shares in the old Waters-Pierce Company were acquired by the Standard Oil Company of New Jersey, such acquisition was wholly lawful as far as the record in this cause shows. The same is true with respect to the acquisition of stock in the present Waters-Pierce Oil Company when the same was formed in 1900. If, then, there was no law in force which denied to the Standard Oil Company

of New Jersey the right to acquire stock in the Waters-Pierce Oil Company when it did acquire such stock. the continued ownership of that stock was a vested right, and could not be disturbed by subsequent legislation without violation of the Federal Constitution. The Act of 1903 is, therefore, unconstitutional and void, in so far as it seeks to subject plaintiff-in-error to penalties and take its property by reason of the stock ownership of the Standard Oil Company existing prior to the passage of this Act, unless it can be shown or unless it is held that the prior law in existence at the time of such acquisition made such acquisition illegal. There is nothing in the record to show that some stock ownership of the Standard Oil Company on May 31, 1900, when the permit was granted to plaintiff-in-error to transact business in Texas, was in violation of any law of the State of Texas and in the absence of any such evidence it must be presumed that such stock ownership was lawful. It was consequently not competent or within the constitutional power of the State of Texas to interfere with such ownership or divest said Standard Oil Company of its property in said stock or make it an offense by this plaintiff-in-error, subjecting it to penalties and to a forfeiture of its permit for such vested and prior ownership to continue.

We do not desire to burden the court with any lengthy discussion of the phrases "**ex post facto law,**" and "**due process of law,**" as used in the Federal Constitution, nor do we think that such discussion is at all necessary. Both are phrases perhaps better understood than defined, and indeed any attempt at definition except with respect to the particular case, must of necessity be unfortunate. "Due process of law" has been declared, both by this court and most of the state appellate tribunals, to be synonymous with that simple and sturdy old Anglo-Saxon phrase, "the law of the land," a phrase which rings with the assertion of individual liberty, equality before the law, judgment only after hearing, condemnation only after opportunity for defense. This "law of the land" is the priceless heritage brought to these shores by our forefathers and upon which the whole structure of our

republican government is erected. Upon it is built a government, not of men or of institutions, but a government of laws, and he who moulds his conduct within the law may ever invoke the protection of this principle when it is sought by arbitrary or despotic power, be it executive, legislative or judicial, to punish him for that which at the time of commission was not unlawful, in that it was not forbidden. The prohibition laid upon the states by the constitution with respect to the passage of *ex post facto* laws received its proper enlargement in the 14th Amendment to that constitution, which limited the power of the state to pass any law by which a man might be deprived of his property, his life or his liberty, without "due process of law"—contrary to the "law of the land." The 14th Amendment was an express recognition of a limitation which most of our courts had declared to exist long before the passage of that amendment, especially with respect to the right of state legislatures to pass laws unreasonable, unjust, oppressive and contrary to the well known principles of right and of law as they had come down to us in the Anglo-Saxon struggle for personal freedom and liberty of conscience.

It is not necessary to quote authorities to substantiate the proposition that a corporation is a "person" within the meaning of that portion of the 14th Amendment above referred to. And it will be equally admitted that the rule above enunciated applies to foreign as well as to domestic corporations doing business within the state. Neither can be deprived of its property without "due process of law."

Can it be contended, then, that "due process of law" is being applied to a corporation which is declared guilty and subjected to an enormous penalty because of an act which it could not control or prevent for an act committed long prior to the enactment of the statute which declares the same unlawful and punishable, for an act which was committed wholly outside of the jurisdiction of the state administering this "due process of law" and which was wholly lawful in the state wherein and when such act was committed—can it be contended that this is the "law of the land?" An examination of the record

in this cause cannot fail to show that it is precisely upon such reasoning as this that the Waters-Pierce Oil Company has been penalized by the State of Texas through a fine equal, if not exceeding, the total value of all its tangible property within the state, and has had that property rendered practically useless by taking it from the corporation in the revocation of its permit to do business, and placing it under the charge and in the control of a receiver, even pending appeal.

To give a retrospective construction to a statute ordinarily clothes it with the character and all the mischiefs of an *ex post facto* law. (Kent Com. 455. Potter's Dwarris, 162, 163, note 9.)

In the leading case of **Calder v. Bull,** (3 Dallas, 386), Mr. Justice Chase uses the following pertinent language:

> "I cannot subscribe to the omnipotence of the state legislature or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and, as they are the foundation of legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments. That no man should **be compelled to do what the laws do not require nor refrain from the acts which the laws permit.** These are acts which the federal or state legislature cannot do without exceeding their authority. There are certain federal principles in our free republican government which will determine and overrule an apparent and flagrant abuse of legislative power as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a

rightful exercise of legislative authority. The obligation of the law in governments established on express compact and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. **A law that punishes a citizen for an innocent action, or in other words for an act which when done was in violation of no existing law;** a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause or a law that takes the property of A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it can not be presumed that they have done so. The genius, the nature and the spirit of our state governments amount to a prohibition of such acts of legislation and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change 'innocence into guilt' or punish 'innocence as a crime' or violate the right of an antecedent lawful private contract or the right of private property. To maintain that our federal or state legislature possessed such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican government."

And, in discussing the meaning of the term "*ex post facto* law," the learned Justice uses this language:

> "The prohibition in the latter is not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states shall not pass laws after a fact done by a subject or citizen which shall have relation to such fact and shall punish him for having done it."

And then follows the classification of *ex post facto* laws which has become so well known to our American Courts, the first one of which—applicable to the case at bar—is this:

> "Every law that makes an action, done before the passing of the law and which was innocent when done, criminal; and punishes such action."

In **Fletcher v. Peck** (6 Cranch, 87), Chief Justice Marshall defines an *ex post facto* law as one which renders an act punishable in a manner in which it was not punishable when it was committed, and declares further that such law may inflict penalties on the person or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate or any part of it shall be seized for a crime which was not declared by some previous law to render him liable to that punishment, and, in applying the rule thus announced to the case under discussion, the Chief Justice, in holding that a law annulling a previous grant was *ex post facto*, says:

> "Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no safe grounds for making this distinction; this rescinding act would have the effect of an *ex post facto* law. **It forfeits the estate of Fletcher for a crime not committed by himself, but by those from he purchased.** This cannot be effected in the form of an *ex post facto* law or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

See also in this connection Watson v. Mercer, 8 Peters, 88; Coffin v. Rich, 45 Me. 507; American Building & Loan Association v. Rainboat, 48 Neb. 434; Stevens v. Southern Pacific Co., 109 Calif. 86; 41 Pac. 783; 29 L. R. A. 751.

(*a.*) THE **EX POST FACTO** EFFECT OF A LAW CANNOT BE EVADED BY GIVING A CIVIL FORM TO THAT WHICH IS ESSENTIALLY CRIMINAL.

The prohibition against the passage of *ex post facto* laws has been so often held to apply only to criminal statutes that are certain to meet with the contention that the Act which is the basis of the suit in the State of Texas against the Waters-Pierce Oil Company does not fall within the constitutional provi-

sion herein invoked, in that that Act is not a criminal law but merely provides for the recovery of penalties by civil suit.

"A crime," says Mr. Walker in his American Law (10 ed. p. 571), "in its legal acceptation signifies any act to which the law attaches a penalty of punishment without any reference to its moral turpitude." Mr. Bishop, in his Criminal Law, Vol. 1, Sec. 32, defines a crime as:"

> "Any wrong which the government deems injurious to the public at large and punishes through a judicial proceeding in its own name."

These definitions might be multiplied to show that it is the **nature of the act comitted** that constitutes the criminal offense, and not the form of proceeding by which the state seeks to punish the offender.

It is true that this proceeding is civil in its form, but, notwithstanding this, it must readily appear that the cause of action is essentially and in its nature criminal. The first section of the Anti-Trust Act, of May 25, 1899, provides that corporations or persons doing the things therein set forth "shall be deemed and adjudged **guilty of a conspiracy to defraud,** and be subject to the penalties as provided by this Act." The second section, after defining a monopoly, provides that "any and all persons, firms, corporations or associations of persons engaged therein shall be deemed and adjudged **guilty of a conspiracy to defraud,** and shall be subject to the penalties prescribed in this act." The sixth section of the Act, after citing further forbidden things, provides that "any person, firm, corporation or association of persons committing such violation shall be deemed and adjudged **guilty of a conspiracy to defraud,** and shall be subject to the penalties prescribed in the Act." Other sections of the same Act, which are not involved in this case, conclude in a similar manner. The fifth section is as follows:

> "Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this Act shall forfeit

not less than Two Hundred Dollars nor more than Five Thousand Dollars for **every such offense,** and each day such person, corporation, partnership or association shall continue to do so shall be a **separate offense.** The penalties in such cases to be recovered by an action in the name of the state at the relation of the attorney-general or the district or county attorney; the monies thus collected to go into the state treasury and to become a part of the general fund, except as hereinafter provided."

The Texas Anti-Trust Act of 1903, after defining a trust, monopoly and conspiracy in restraint of trade and declaring the same prohibited and illegal, provides in paragraph 11 of said Act as follows:

"Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this Act shall for each and every day that such violation shall be committed or continued forfeit and pay the sum of Fifty Dollars which may be recovered in the name of the State of Texas in any county where the **offense** is committed or where either of the **offenders** reside or in Travis County. And it shall be the duty of the attorney-general or of the district or county attorney, under the direction of the attorney-general, to **prosecute** for the recovery of the sum, and the fees of the prosecuting attorney for representing the state in proceedings under this Act shall be over and above the fees allowed him under the general fee bill."

Section 13 of the same Act provides as follows:

"And in addition to the **penalties** and forfeitures herein provided for, every person violating this Act **may further be punished by imprisonment in the penitentiary not less than one nor more than ten years.**

The language above quoted from the Anti-Trust Laws of 1899, and 1903, is certainly appropriate to the definition of an offense against the law, and itself characterizes every violation of either act as an offense. If we apply the definitions above noted, there cannot be the slightest doubt that violations of either of these Acts constitute a crime. It is needless to observe that the word "crime" and the word "offense" are synonymous. Reference to the penal code of the State of Texas

will show that they are used interchangeably throughout the code.

In the case of **Huntington v. Attrill** (146 U. S. 657), the Supreme Court of the United States, in the following language, clearly lays down the test which shall be applied to determine when or whether a law is penal.

> "The test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. According to the familiar classification of Blackstone wrongs are divisible into two sorts or species, private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals considered as individuals, and are therefore frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community, and are distinguished by the appellation of crimes and misdemeanors."'

The principle that a crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name, finds expression in many cases, and the fact that the judicial proceeding may be civil in form has been repeatedly held not to change the nature of that which in its real character is criminal.

From among the many cases, we select only a few to illustrate the law upon this subject.

In **Wisconsin v. Pelican Insurance Co.** (127 U. S. 265), the State of Wisconsin filed in the Supreme Court of the United States a civil suit to collect a judgment rendered in one of its courts against the Pelican Insurance Company, a Louisiana corporation, for penalties imposed by the State of Wisconsin for doing an insurance business in that state without having deposited with the proper officer the statement, required by the laws of Wisconsin, of the property and business of the corporation during previous years. The question was raised by the defendant that, though the judgment sued upon had been rendered in a proceeding in the form of a civil suit, nevertheless the Supreme Court should look through the form to the sub-

stance, and, that if it did so, it would ascertain that the judgment had been recovered upon a cause of action which was criminal in its character, and that, under the well-recognized rule that the courts of no country will execute the penal laws of another, which must be held applicable to an original suit filed in the Supreme Court of the United States between a state and citizens of another state, the Supreme Court of the United States could not properly entertain jurisdiction of the suit. The contention of the defendant was sustained by the Supreme Court of the United States, and judgment rendered for defendant on demurrer.

In holding that the cause of action of the State of Wisconsin, in the suit which had been instituted in one of its courts against the insurance company for penalties, and in which the judgment sued upon in the Supreme Court of the United States had been rendered, was penal, the Court, among other things, Mr. Justice Gray delivering the opinion, observed:

> "The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty would accrue to the State and be paid one-half into her treasury and the other half to her Insurance Commissioner, who pays all expenses of prosecuting for and collecting such forfeitures (Laws of Wisconsin, 1885, chap. 395). **The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offense**; it is immaterial whether by the law of Wisconsin the prosecution must be by indictment or by action or whether under her law a judgment there obtained the penalty might be enforced by execution, by *scire facias* or by new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end—the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

In the case of **Boyd v. U. S.** (116 U. S. 616), which was a proceeding *in rem* to enforce a forfeiture of property for the violation of a revenue law, it appeared that the statute under which the suit was brought empowered the court in all suits and proceedings, other than criminal, arising under the revenue laws

of the United States, to require the defendant or claimant, on motion, to produce any of his books or invoices for the purpose of examination and proof under the penalty of having the allegations made in the motion deemed as confessed, and that the claimant in that case had been required by an order of the court to produce an invoice tending to show the quantity and value of the goods seized and had done so, and that the invoice had been introduced in evidence over his objections, to the effect that the law was unconstitutional and the order unauthorized.

One of the questions presented was whether the proceeding *in rem*, which was a civil action, in form at least, was a criminal case within the meaning of the Fifth Amendment to the Constitution of the United States, which declares that no person shall be compelled in any criminal case to be a witness against himself. The Supreme Court of the United States reversed the judgment of the trial court, and in its opinion, delivered by Mr. Justice Bradley, observed:

> "We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture declared in the 12th section of the Act of 1874, on which the information is based, consists of the certain acts of fraud committed against the public revenue in relation to imported merchandise which are made criminal by statute, and it is declared that the offender shall be fined not exceeding Five Thousand Dollars nor less than Fifty Dollars or be imprisoned not exceeding two years or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to a criminal act, the forfeiture sought by the suit being one of them. If an indictment had been presented against the criminal, upon conviction, the forfeiture of the goods would have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the criminal—that is, civil in form—can he by this defense take from the proceeding its criminal aspect and deprive the criminals of their immunities as citizens and extort from them the protection of their

private papers or as an alternative a confession of guilt? This cannot be. The information, though technically a civil proceeding is in substance and effect a criminal one. As showing the close relation between the civil and criminal proceeding on the same statute in such cases, we may refer to the recent case of Cofey v. United States, 116 U. S. 436, in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon the same acts; as, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

In the case of **Lees v. United States** (150 U. S. 476), a civil suit was brought in the United States District Court to recover penalties and forfeitures for the violation of the Act of Congress prohibiting the importation of foreign laborers. Lees, one of the defendants, was called as a witness by the government, whereupon his attorney objected to his being compelled to testify, invoking the protection of the Fifth Amendment to the United States Constitution. The trial court overruled the objection and required Lees to testify. The case went up to the United States Supreme Court on writ of error, and the court, in passing upon the action of the trial court in compelling defendant to testify over his objections, declared through Mr. Justice Brewer:

"This, though an action in civil form, is actually criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of Boyd v. United States, 116 U. S. 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case, and within the rule there laid down it was error to compel this defendant to give testimony in behalf of the government."

In the case of the **United States v. Shapleigh** (54 Fed. Rep. 126), a civil action was begun against the defendant for dam-

ages and penalties for violating an act of Congress rendering any person liable for penalties and damages for exhibiting a false or fraudulent claim against the United States to one of its officers for payment or approval. The trial court instructed the jury that, to entitle the government to a verdict in the case, every fact necessary to conviction must be proved **beyond a reasonable doubt.** The defendant was acquitted and the government carried the case by writ of error to the Circuit Court. Judge Sanborn of the Circuit Court delivered an elaborate opinion in the case, reviewing all the authorities upon the subject, and sustained the ruling of the trial court, holding that, though civil in form, the action was criminal and that the rules of criminal law were applicable in so far as to demand that the guilt of the defendant should be shown beyond a reasonable doubt.

In **Burgess v. Salmon** (97 U. S. 381), an action was begun against the defendant to recover an additional tax upon manufactured tobacco under an act passed after the manufactured goods had been surrendered and transported. The Supreme Court of the United States, speaking through Mr. Justice Hunt, declared the action, though civil in form, to be criminal and within the prohibition of passing an *ex post facto* law. To the same purport are the decisions in Fletcher v. Peck, 6 Cranch, 87; Cummings v. Missouri, 4 Wallace, 277; Pierce v. Carskaden, 16 Wallace, 234; United States v. Hughes, Fed. Cases, No. 15,416.

In the latter case, an action of debt was brought against the defendants to recover the value of certain importations of merchandise alleged to have been entered by them at the custom house, New York, on fraudulent invoices. On the trial of the cause, the United States District Attorney, under the Act of 1874, attempted to compel defendants to produce certain books and papers in connection with such invoices. Blatchford, District Judge, in holding that such order was void and that defendants could not be compelled to testify against themselves, says:

"It has always been held that the provisions of the Constitution of the United States that no *ex post facto* law shall be passed by Congress, and that no State shall pass any *ex post facto* law, apply not merely to criminal laws and cases, but to cases for the recovery of penalties and forfeitures."

In **State *ex inf.* v. Bland** (144 Missouri, 534), the Supreme Court of Missouri was called to pass upon the nature and character of the Corrupt Practices Act of that State. The court, speaking through Marshall, J., says:

"This Act is penal in its every nature and fiber. It provides for punishment as for felonies and as for misdemeanors, and also for forfeiture of office even after the incumbent has received a majority of the votes cast at the election and has been inducted into office. The Act should, therefore, be strictly construed, and nothing should be regarded as included in it which is not clearly and intelligently described in its very words. (Citing Connell v. Union Telegraph Company, 108 Mo. 459; Rozelle v. Harmon, 103 Mo. 339; State *ex rel.* v. Smith, 114 Mo. 180; Dudley v. Western Union Telegraph Company, 54 Mo. App. 391.)"

In **State *ex inf.* v. Firemen's Fund Insurance Company** (152 Mo. 1), the Supreme Court again declared such acts to be penal in their nature, and that they should be strictly construed; in this case directing its remarks particularly to the Missouri Statute forbidding the formation of pools and trusts, and punishing those who participated therein.

Judge Cooley, in his Constitutional Limitations, 7th Ed., page 375, sums up the rule in this language:

"It is not essential, however, in order to render a law invalid on these grounds (*ex post facto*) that it should expressly assume the action to which it relates to be criminal or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act which when done involved no responsibility or if it deprives a party of any valuable right—like the right to follow a lawful calling—for acts which were innocent or at least not punishable by law when committed, the law will be *ex post facto* in the constitutional sense, notwithstand-

ing it does not in terms declare the acts to which the penalty is attached criminal."

If our contention, then, is correct, that the Anti-Trust Act of 1899 is a penal act, and that suits brought thereon are criminal suits, the conclusion must logically follow that to give such act a retroactive effect upon acts committed prior to its passage is to clothe it with all the characteristics of an *ex post facto* law—and the same in equal measure is true of the Act of 1903—and thereby to render these acts void.

III.

THE STATE OF TEXAS CANNOT CONSTITUTIONALLY ENACT A LAW WHICH DENOUNCES AS AN OFFENSE AN ACT COMMITTED IN ANOTHER STATE AND PUNISH PLAINTIFF-IN-ERROR FOR AN ALLEGED OFFENSE COMMITTED WHOLLY OUTSIDE OF THE JURISDICTION OF THE STATE OF TEXAS.

Says Mr. Justice Cooley, in his Constitutional Limitations, (7th Ed.), page 176:

> "The legislative authority of every State must spend its force within the territorial limits of the State. The legislature of one State cannot make laws by which people outside of the State must govern their actions, except as they may have occasion to resort to remedies which the State provides or to deal with property situated within the State. It can have no authority upon the high seas beyond State lines, because there is the point of contact with other nations, and all international questions belong to the national government. It cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done."

Our contention is that, in so far as it is sought to hold the Waters-Pierce Oil Company liable and to punish it because of

the fact that the Standard Oil Company of New Jersey acquired a portion of its stock, which transaction took place entirely outside of the jurisdiction of the State of Texas, and within the jurisdiction of the State of Missouri, and in so far as it sought to hold the Waters-Pierce Oil Company liable and punish it for entering into an alleged agreement with the Standard Oil Company, which said agreement, if made at all, was made outside the jurisdiction of the State of Texas, the said State of Texas is exceeding its constitutional powers, in that it is attempting to denounce and punish as an offense the doing of an act wholly outside of the territorial jurisdiction of the State.

> "Crimes are in their nature local and the jurisdiction of them is local. They are cognizable and punishable exclusively in the country where they are committed." (Lewis' Sutherland, Statutory Construction, Vol. 1, Sec. 13.)

"Criminal laws," says Mr. Justice Story, in the case of The Apollon (9 Wheaton, 362), "must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction."

In the **State v. Knight,** Taylor 65 (N. C. 1799), an attempt was made by the State of North Carolina to punish the defendant for counterfeiting in another state. The court said:

> "The legislature of one State cannot define and punish crimes committed in another."

In *in re* **Grice** (79 Fed. Rep. 627), the petitioner, who was imprisoned by the State of Texas awaiting trial on an indictment charging a violation of the Texas Anti-Trust Act, sought to be released on *habeas corpus* before the Federal Court on the ground that the said Act was in violation of the federal constitution. That portion of the Act in question reads as follows:

> "9. Persons out of the State may commit and be liable to indictment and conviction for committing any of the offenses enumerated in this Act, which do not, in their commission, necessarily require a personal presence in this State, the object being to reach and punish all per-

sons offending against its provisions, whether within or without the State."

The Circuit Court of the United States, speaking through Judge Swain, in discharging relator under the writ, uses the following language (page 638):

"The fifth paragraph of the said Act in which it is attempted to claim jurisdiction for offenses committed outside the State of Texas, is so absurd that a denial thereof is scarcely necessary. It has been decided in emphatic language by Mr. Justice Taney, in United States v. Booth, 21 Howard, 524, as follows: 'No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.' This principle is elementary and not only common law but the commonest of common sense. It has been properly suggested that should this feature of this Act be carried out and administered, it would be unnecessary for any other State or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and conduct of their business according to the wishes of the legislature of Texas. The State in its criminal jurisdiction as to Acts committed within its own boundaries and within the limits prescribed by the Federal Constitution is sovereign, and its process should not be interfered with where it does not contravene said constitution, but beyond the boundaries of the State, it has no more authority in New York, Missouri or Ohio than it has in Great Britian or Austria, and that part of the Act which proposes this extra-territorial jurisdiction is absolutely null and void."

This case was appealed to the United States Supreme Court (Baker v. Grice, 169 U. S. 285), and reversed, solely, however, upon the jurisdiction of the subject matter involved.

In **State v. Cutshall** (110 N. C. 538; 16 L. R. A. 130), defendant was indicted for the violation of the criminal code defining and punishing bigamy, it being charged that the defendant contracted the second marriage in the State of South Carolina and outside of the State of North Carolina. The Supreme

Court, speaking through Avery, Justice, in a carefully reasoned opinion in which all the authorities are examined, says:

> "The attempt to evade the organic law by making the coming into this State (after committing an offense in another) a crime is too palpable in view of the admitted fact that the Constitution of the United States gives to citizens of all the States the immunities and privileges of its own citizens, of their guaranteed right under the interstate commerce clause to pass through another State without arrest and inquiry into their accountability for offenses against their own sovereignty, but especially because the trial of the new felony involves an investigation of the original bigamy by a jury not of the vicinage and remote from the witnesses."

In **Allgeyer v. Louisiana** (165 U. S. 578), the Supreme Court of the United States held that the State of Louisiana could not constitutionally punish as an offense an act of one of its citizens in entering into a contract of insurance outside of the State of Louisiana with a foreign insurance company for the insurance of property within that State. Mr. Justice Peckham, delivering the opinion of the court, said:

> "The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it (citing Milliken v. Prate, 125 Mass. 374; Tilden v. Blair, 21 Wallace, 241).
>
> The contract in this case was thus made, it was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State. * * *
>
> Any act of the State legislature which would prevent the entering into of such a contract or the mailing within the State of Louisiana of such a notification as is mentioned in this case is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, and his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

If our contention, based upon these authorities, is correct, the conclusion naturally follows that the imposition of penalties upon the Waters-Pierce Oil Company for alleged acts done and

alleged agreements entered into wholly outside of the jurisdiction of the State of Texas deprives the Waters-Pierce Oil Company of its property without due process of law, and in so far is unconstitutional and void.

IV.

THE WATERS-PIERCE OIL COMPANY CANNOT BE HELD LIABLE BECAUSE OF ANY ALLEGED AGREEMENT BETWEEN ITS PREDECESSOR, THE OLD WATERS-PIERCE OIL COMPANY AND THE STANDARD OIL COMPANY OF NEW JERSEY, SOLELY ON ACCOUNT OF THE PURCHASE BY THE WATERS-PIERCE OIL COMPANY OF ITS PREDECESSOR'S BUSINESS, PROPERTY AND GOOD WILL.

The record herein shows that the Standard Oil Company, from some time in the year 1882, owned a majority of the shares of the old Waters-Pierce Company down to the incorporation of this plaintiff-in-error on the 29th of May, 1900, and that, on or about the 24th of September, 1900, a majority of the shares of plaintiff-in-error which had up to that time been held by H. C. Pierce in trust for the said Standard Oil Company (the same having by agreement been so issued to him upon the formation of plaintiff-in-error on account of the interest of the said Standard Oil Company in the old Waters-Pierce Company) were transferred to the said Standard Oil Company by an indorsement of the certificates thereof in blank by the said H. C. Pierce without registration of any transfer of the same on the books of plaintiff-in-error until early in the year 1904, when the said Standard Oil Company caused the same to be transferred and registered on the books in the name of M. M. Van Beuren. And the record further shows that evidence was adduced at the trial that the old Waters-Pierce Company carried on its business throughout the

whole of Texas and in several other States and in Mexico, and obtained its supplies of refined oil almost exclusively from the Standard Oil Company, and that the said Standard Oil Company did not carry on such business in said territory, and that this plaintiff-in-error, after acquiring the business and property of the old Waters-Pierce Company, carried on its business in precisely the same territory and in precisely the same way as its predecessors, to whose business and property it had succeeded without extending the same into any other territory, and that the Standard Oil Company continued its business in the same manner and form as it had been doing for many years past, and did not extend its business into the territory in which plaintiff-in-error so carried on business, but confined its business to the same territory in which the same had been carried on prior to the formation of plaintiff-in-error. The above constitutes a brief but correct statement of all the evidence on this point introduced at the trial of this cause as shown by the record, and upon this evidence the court instructed the jury in such manner that the jury found from said evidence that the agreement or understanding originally entered into between the old Waters-Pierce Company and the Standard Oil Company became an agreement or understanding on the part of plaintiff-in-error with the said Standard Oil Company as soon as said plaintiff-in-error had acquired the business and property of the old Waters-Pierce Company, and conducted said business in the same manner and in the same territory as the old Waters-Pierce Company had done (Secs. Vol. II, VIII, IX, instructions, record, pp. 1145ff), and said jury also found under said instructions (Secs. X, XI instructions, Record, p 1147 ff,) and upon the above-mentioned evidence that the Waters-Pierce Oil Company had bought about or permitted a combination or union of its capital with the capital of the Standard Oil Company by means of the acts of the Standard Oil Company in acquiring a majority of the shares of the old Waters-Pierce Company long before the passage of the Texas Anti-Trust Acts of 1899 and 1903, and before this plaintiff-in-error as a corporation came into existence and in holding such shares until plaintiff-in-error was

incorporated and acquired the property and business of the old Waters-Pierce Company, and then taking a beneficial interest in a corresponding majority of the shares of the newly organized Waters-Pierce Oil Company for its interest in the old Waters-Pierce Company, in which acts of the Standard Oil Company plaintiff-in-error had no part, and which acts were not done in the State of Texas, nor was any evidence adduced to prove the existence of any combination or union as alleged, excepting as above shown, to-wit: the purchase by plaintiff-in-error of the property and business of the old Waters-Pierce Company which alone was a party to such agreement, if such agreement ever was made, and the ownership by the Standard Oil Co. of a majority of the stock of plaintiff-in-error, acquired in the manner and under the conditions hereinbefore pointed out.

We contend that the instructions of the trial court, the verdict of the jury found thereon and judgment entered, together with the ruling of the appellate court upholding the same, can be construed to mean only one thing—that the Waters-Pierce Oil Company, plaintiff-in-error herein, when it purchased the property, business and good-will of the old Waters-Pierce Company at the time of its dissolution, obtained not only through that contract of sale the property, tangible and intangible, but also the liabilities of its predecessor, criminal as well as civil. In other words, the old Waters-Pierce Company now being dead, its sins are to be visited upon its successor because of its temerity in purchasing the property of the defunct corporation which can no longer be punished.

Among the many quaint legal rules which obtain in the system of Roman jurisprudence, as expressed in the Code and Digest, none is probably more interesting to the Anglo-American lawyer than the rules of law applicable in Rome to the succession of property of a decedent, and especially that rule of law whereby an heir inherited, not only the assets of his deceased ancestor, but his debts as well (Gaius III, 83; IV, 38); under some circumstances, at one time, a Roman citizen might will away his debts as well as his possessions.

Such a principle or rule may, perhaps, have its advantages, but it will hardly be contended that any such principle has ever found place in our Anglo-American law. Yet it is precisely upon some such principle as this that the present Waters-Pierce Oil Company is charged with and convicted of having entered into a combination with the Standard Oil Company, contrary to the Anti-Trust Laws of Texas.

The right of a new corporation buying the assets of one which it succeeds to hold them free from the obligations of the latter, although not often denied, has been expressly affirmed in a number of cases.

In **Austin v. Tecumseh National Bank** (49 Neb. 416; 68 N. W. 628; 35 L. R. A. 444), it is specifically held, and the rule applied, that the debts of an established corporation to whose business and property another has succeeded cannot be recovered of its successor unless it affirmatively appears that the transaction by which the successor corporation obtained such property was fraudulent, or that the facts warrant the conclusion that the successor corporation is a mere continuation of its predecessor, or that a special agreement has been entered into by which the successor corporation assumes the debts of its predecessor.

In the **Capitol Traction Company v. Offutt** (17 App. D. C. 292; 53 L. R. A. 390), a case which we have already discussed in connection with another point in this argument, an action was brought against the Traction Company for an alleged tort committed by its predecessor, the Washington Georgetown Railroad Company, whose property, good-will and business had been purchased by the defendant. The Court of Appeals of the District of Columbia, speaking through Morris, J., uses the following language:

> "A contract of purchase and sale between two corporations is no different in law from a similar contract between two individuals except that individuals may contract freely with each other and corporations require legislative authority to enter into such contracts as are involved in the case under consideration. Construction and effect

would be the same whether such contracts were made by individuals or by corporations. In neither case would the purchaser become liable either for the torts or contracts of the vendor, and least of all for the torts, unless such liability entered into the transaction and became a part of the consideration for the transfer and then only in the manner and to the extent stipulated. This is so plain a principle of law and justice that it needs only to be stated in order to insure its prompt acceptance. It is very plain, therefore, that something more than the mere purchase of the assets and franchises of one company by another under authority of law given for such sale and purchase is required to effect a consolidation of the two companies or to charge the purchaser company with the liabilities of the vendor."

And applying the above principle to the cause before it, the court held that without express stipulation in the contract of sale or some showing of fraud, the defendant could not be held liable for the contracts or torts of its predecessor whose property it had lawfully acquired.

In **Wyman v. Hallowell Bank,** (14 Mass., 57; 7 Am. Dec. 194), an action of assumpsit was brought against the defendant Bank upon certain promissory notes or bank bills alleged to have been made by its predecessor whose business and property the defendant had purchased; the Supreme Court of Massachussets, speaking through Parker, Chief Justice, held that even through the successor Bank might have the same stockholders and the same officers as its predecessor yet unless fraud could be shown or some agreement to such effect appeared in the contract of purchase, the defendant could not be held liable for the debts of its predecessor.

In **Bellows v. Hallowell and Augusta Bank,** (2 Mason, 31; Fed. Cases, 1279), a similar action was brought against the same Bank in the District Court of the United States for the District of Maine. The United States Circuit Court, on appeal, speaking through Mr. Justice Story, in passing upon the same question involved in the preceding case, uses the following language:

"The first ground rests on the suggestion that the old bank and the new bank are the same corporation, the

new charter being but a re-incorporation or rather a continuation of the charter of the old bank which would otherwise have expired by its own limitation. If the premises were well founded, the conclusion would certainly follow that the new bank is liable for the debts of the old bank, but we are called upon to admit these premises, not upon the plain and positive enactment of the statute incorporating the new bank, but upon the collateral facts that the names of both corporations are the same, the officers are the same and a majority of the stockholders are the same and that the business of the old bank was for a time done and its debts paid by the new bank. It is certainly true that a corporation may retain its personal identity, although its members are perpetually changing, for it is its artificial character, powers and franchises and not the natural character of its members which constitute that identity and for the same reason corporations may be different, although names, officers and the members of each are the same. An insurance company composed of the same natural persons and officers and with the same name as an existing incorporated bank would still be a different corporation from the bank. The similarity of names of officers or of members or even of objects cannot then *per se* establish the identity of corporations created at different times by different charters and having a distinct independent being, and one corporation may transact the business and pay the debts of another corporation without thereby merging in the latter its distinct corporate existence. There is, indeed, a repugnancy in the statement of the proposition that two corporations are in point of law the same, for it would at the same time establish that there is but one corporation. To ascertain whether a charter created a new corporation or merely continued the existence of an old one, we must look to its terms and give them a construction consistent with the legislative intent and the intent of the incorporators."

The same rule and principle is applied in the case of Gulf, Colo. & S. F. Railway Company v. Newell, (73 Texas, 334; 50 Am. St. Rep. 788), in Columbus, Sandusky and Hocking R. R. Co. App. (109 Fed. Rep. 177) and Marshall v. W. N. C. R. R. Co. (92 N. C. 322).

From the above authorities it would seem to be clear that the Waters-Pierce Oil Company cannot be held liable as a party to

any alleged agreement between its predecessor, the old Waters-Pierce Company and the Standard Oil Company of New Jersey, which alleged agreement it is charged is in violation of the Anti-Trust Laws of Texas, solely on account of the fact that the Waters-Pierce Oil Company purchased the old Waters-Pierce Company's business, property and good-will. The mere fact that the Waters-Pierce Oil Company, plaintiff-in-error herein, did confine its business to the same territory in which the old Waters-Pierce Company originally operated is not of itself sufficient to connect plaintiff-in-error with any agreement with the Standard Oil Company by reason thereof, even admitting that there was originally such an agreement between the Standard Oil Company and the old Waters-Pierce Company and that said agreement was unlawful. The Standard Oil Trust Agreement above referred to was made some time in January, 1882, and so far as the record appears there is nothing to show that the old Waters-Pierce Company or any of its officers or stockholders except the Standard Oil Company ever became a party to that agreement. Plaintiff-in-error was incorporated in 1900, and we submit that it requires a considerable stretch of imagination to connect the present Waters-Pierce Oil Company with the agreement which was formed some eighteen years before it ever came into existence. It may be permissible in some cases to judge the future by the past but we submit that it is extremely illogical to test the remote past by events transpiring many years afterward; and yet this is the method applied in this case, in that it is claimed circumstances exist to-day from which a violation of the law may be inferred. But the State is not content even with this, but charges and convicts this plaintiff-in-error because on January 1st, 1870, thirty years before plaintiff-in-error was born, certain persons incorporated the Standard Oil Company of Ohio for the purpose, as is alleged, of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States, including the State of Texas. (Instructions, Record, p. 1141.) The purpose here charged

is based entirely upon conjecture, no evidence being offered to prove the same except that many years afterward said company or its successors did actually come into control of most of the oil business through careful, able and consistent business management and extension of its operations. The scheme and conspiracy which it is charged existed in the formation of the Standard Oil Company of Ohio in 1870, can hardly be held to constitute an infraction of the Anti-Trust Laws of the State of Texas, none of which existed at that time and for the violation of which plaintiff-in-error stands charged and convicted. The Anti-Trust Act of 1899, was not passed until more than twenty-nine years after the formation of the alleged conspiracy and the Anti-Trust Act of 1903 was not passed until more than thirty- three years thereafter. To connect this plaintiff-in-error with an agreement made long before it or even its predecessor came into existence would seem to tax even a fertile imagination. It is only from the operation of the present Waters-Pierce Oil Company many years after the incorporation of its predecessor whose business it purchased, that any design on the part of said company can be shown, to monopolize the business of selling petroleum in the State of Texas; and if one divests himself of the preconceived notion that the Standard Oil Company was formed for the express and sole purpose of obtaining and enjoying a monopoly of the oil trade of the country, in the furtherance of which design and purpose this plaintiff-in-error is directly interested and concerned,—if the record in this case alone is considered—there would be great difficulty, if not utter impossibility, in reaching the conclusion from the facts in this case that there ever existed or now exists any design on the part of the Standard Oil Company or of this plaintiff-in-error to monopolize and control the oil business either in the entire country or in the State of Texas. The State of Texas says in so many words,—the fact that the Waters-Pierce Oil Company actually does operate in practically all of the cities of Texas and has no competitors of any importance is proof conclusive that somewhere and somehow it conceived the

scheme and entered into the conspiracy to monopolize the oil trade and for that it must be held guilty for an infraction of the laws. And for this it is penalized in an enormous sum, its permit cancelled and its control and management of its property taken from it. We submit that the errors herein complained of, in their effect upon this plaintiff-in-error, deprive it of its property without due process of law, and in so far are within the prohibition of the XIV Amendment to the Federal Constitution.

V.

ADMITTING THE OWNERSHIP OF A PORTION OF THE STOCK OF THE WATERS-PIERCE OIL COMPANY BY THE STANDARD OIL COMPANY OF NEW JERSEY, THIS FACT IS NOT ENOUGH TO ESTABLISH THE EXISTENCE OF A "COMBINATION" BETWEEN THE TWO CORPORATIONS WITHIN THE MEANING OF THAT TERM AS USED IN THE TEXAS ANTI-TRUST ACTS OF 1899 AND 1903, AND TO HOLD THE WATERS-PIERCE OIL COMPANY GUILTY OF ENTERING INTO A "COMBINATION" WITH THE STANDARD OIL COMPANY AND PUNISHING IT THEREFOR IS TO DEPRIVE THE WATERS-PIERCE OIL COMPANY OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, DENY IT THE EQUAL PROTECTION OF THE LAWS AND HOLD IT LIABLE UNDER EX POST FACTO AND RETROSPECTIVE LAWS.

The following is a condensed statement of the material facts proved and agreed on at the trial of this cause and the material evidence introduced therein, touching the proposition above set forth:—

ABSTRACT OF EVIDENCE.

The State of Texas introduced in evidence an agreement entered into between its counsel and counsel for plaintiff in error wherein the following facts were admitted: That the Standard Oil Company of New Jersey is a corporation organized under the laws of New Jersey; that since its organization in 1882, it has not conducted any business in the State of Texas, and that it has not applied for or been granted a permit to transact any of its corporate business in the State of Texas; that said Standard Oil Company of New Jersey owned a portion of the stock of the Waters-Pierce Oil Company, a corporation organized under the laws of the State of Missouri in May, 1878, to-wit: 2747 shares out of a total of 4000 shares of said company, and that since about the 24th of September, 1900, said Standard Oil Company of New Jersey has owned 2748 shares of the total of 4000 shares of the Waters-Pierce Oil Company organized under the laws of Missouri, May 29th, 1900; that the said Standard Oil Company of New Jersey owns and has owned practically since the date of their creation a majority of the capital stock of the various corporations below named and doing business as below stated, and that no one of said corporations has at any time since its organization transacted any business in the State of Texas or applied for or obtained a permit to do such business; said corporations and their place of business is as follows:

The Standard Oil Company of Indiana, incorporated under the laws of Indiana, June 11th, 1889, and doing business in Indiana and part of Missouri, Illinois, Iowa, Wisconsin, Michigan, Kansas, South Dakota and North Dakota.

The Standard Oil Company of New York, organized under the laws of the State of New York, August 10th, 1882, and doing business in New York, Connecticut, Rhode Island, Massachusetts, Vermont and New Hampshire.

The Standard Oil Company of Kentucky, organized under the laws of the State of Kentucky, October 7, 1886, and doing business in Kentucky, Tennessee, Georgia, Florida, Alabama, Mississippi and part of Louisiana.

The Continental Oil Company, a corporation organized

under the laws of the State of Iowa in December, 1884.

The Republic Oil Company, organized under the laws of the State of New York, June 4, 1901.

The State of Texas further introduced in evidence an agreement entered into between its counsel and counsel for plaintiff-in-error whereby the following facts were admitted, namely, that the copies of the agreement, commonly called the Standard Oil Trust agreement, being exhibits A and B, of the petition of the State of Texas (record, page 7 and page 16) were true copies of said agreements; that the Waters-Pierce Oil Company, organized under the laws of Missouri in May, 1878, the predecessor of this plaintiff-in-error, did not sign either of said agreements or the supplement thereto; that H. Clay Pierce at that time owned substantially 40 per cent of the stock of the old Waters-Pierce Oil Company, and that he did not sign either of the aforesaid agreements or deposit any of its stock thereunder; that Horace A. Hutchins and W. P. Thompson at the date of said agreements owned substantially 40 per cent of the stock of the said Waters-Pierce Oil Company, and that they did sign said agreement and did deposit their stock thereunder; that the Chess-Carley Company at the date of said agreements owned substantially 20 per cent of the stock of the said Waters-Pierce Oil Company and that said Chess-Carley Company did not sign said agreement, but did deposit their shares thereunder; in consequence whereof from the date of the organization of the Standard Oil Trust in accordance with said agreements the trustees of the said Standard Oil Trust owned and held substantially 60 per cent of the capital stock of the old Waters-Pierce Oil Company and continued to hold the same until some time in the year 1892. All reference made to the Waters-Pierce Oil Company hereinbefore is to the old Waters-Pierce Oil Company which was organized in Missouri in May, 1878, and which dissolved in 1900. The State of Texas introduced in evidence a copy of the instrument known as the Standard Oil Trust agreement, the same being exhibits A and B, attached to the State's petition in this suit, the original agreement being dated January 2, 1882, with the supplement thereto under date of January 4, 1882. This agreement was entered into between a large number of individuals, consisting of the three following classes, to-wit: (1) All the stockholders of certain corporations and partner-

ships and, among others, the Atlantic Refining Company, the Standard Oil Company of Ohio and the Standard Oil Company of Pittsburgh. (2) Certain individuals, among others, John D. Rockefeller, Benjamin Brewster, John D. Archbold, and (3) a portion of the stockholders and members of certain corporations and limited partnerships, among others, the American Lubricating Oil Company, the Consolidated Tank Line Company, Chess-Carley Company and the Waters-Pierce Oil Company; said agreement provided that as soon as practicable corporations should be formed in each of the states of Ohio, New York, Pennsylvania and New Jersey for the purpose of refining and dealing in petroleum and its products, and that all of the properties belonging to the corporations and limited partnerships of the first class above should be transferred to said several companies formed in the above named states, and also the businesses of the persons composing the second class above and the stock owned by the persons in the third class above should be conveyed to the trustees named in the agreement. Said agreement named nine trustees and provided for the election of their successors and to fill vacancies. It was further provided by said agreement that all of the properties and businesses thus amalgamated should be managed and controlled by the trustees in the agreement named and their successors during the lives of the original trustees and the life of the survivor of them and for twenty-one years thereafter; that in lieu of the properties and businesses thus placed in said trust, the various persons putting such property or business therein should receive certificates to be known as the Standard Oil Trust certificates, same to be issued in proportion to the value of the stock, property or business so placed in the trust. Said agreement further provided for the payment of dividends, etc.

The State of Texas further introduced in evidence certified copies of the charters of the following corporations, each of which were shown to have been incorporated for the purpose, among other things, of refining and dealing in petroleum and its products, namely:

The Standard Oil Company of Ohio, incorporated in Ohio, in 1870, by John D. Rockefeller, H. M. Flagler, Samuel Adams, Stephen V. Harkness and William Rockefeller.

The Waters-Pierce Oil Company, incorporated in Missouri in 1878, by W. H. Waters, H. C. Pierce, H. A. Hut-

chins, Francis B. Carley and W. P. Thompson, having an original capital of $100,000, which by an amendment to the charter June 13, 1882, was increased to $400,000, said increase in the capital stock being owned as follows, to-wit: Chess-Carley Company, $60,000; William H. Waters, $120,000; and the Standard Oil Company, $120,000.

The Standard Oil Company of New Jersey, incorporated in New Jersey August 1, 1882, with a total capital stock of 30,000 shares of a par value of $100 each, of which 29,996 shares were owned by the Standard Oil Company, together with different amendments to said charter whereby the capital stock was increased to one hundred and ten million dollars and whereby additional power was given said corporation, among other things, to own shares of stock, bonds or other evidences of indebtedness of other corporations, the list of stockholders at said time consisting, among others, of John D. Rockefeller, John D. Archbold, Henry M. Flagler, H. A. Hutchins, O. H. Payne, Henry H. Rogers, William Rockefeller and W. H. Tilford.

The Standard Oil Company of Kentucky, incorporated under the laws of Kentucky, in February, 1887, the charter naming as first directors, W. H. Tilford, George H. Vilas, Henry H. Rogers, John D. Archbold and W. P. Thompson.

The Standard Oil Company of Pittsburg, incorporated in Pennsylvania, August 20, 1868.

The Standard Oil Company of Indiana, incorporated in Indiana, July 18, 1889, the charter whereof named as first directors George H. Vilas, W. H. Tilford, W. P. Cowan, Frank Q. Barstow and Ambrose McGregor, together with an amendment to said charter under date of March 16, 1892, reciting that the Standard Oil Trust owned 4995 of the shares of the capital stock of said corporation.

The Standard Oil Company of Iowa, incorporated in Iowa, June 10, 1885, by John D. Archbold, W. H. Tilford and S. C. T. Dodd, together with an amendment to said charter dated February 24, 1892, authorizing an increase of capital stock and showing the stockholders at that time to be H. L. Tevis, W. H. Tilford, Henry H. Rogers, John D. Archbold, Benjamin Brewster, H. N. Fl[illegible], O. B. Jennings, William Rockefeller and John D. Rockefeller.

The charter of the Standard Oil Company of New York, incorporated in New York, August, 1882, by William Rockefeller, J. A. Bostwick, Benjamin Brewster, O. B. Jennings

and Charles Pratt, with various amendments to said charter, the particulars whereof are not necessary to be herein set forth.

The charter of the Atlantic Refining Company, incorporated in Pennsylvania, April, 1870, with sundry amendments thereto, and showing that W. G. Warden and C. E. Bushnell were officers of said company at sundry times.

The charter of the Waters-Pierce Oil Company (plaintiff-in-error) incorporated in Missouri, May 29, 1900, by H. Clay Pierce, Andrew M. Findlay, J. P. Gruet, Charles N. Adams and John D. Johnson, and showing that the copy of said charter was filed in the office of the Secretary of State of the State of Texas, May 31, 1900.

The permit to do business in the State of Texas issued to the Waters-Pierce Oil Company (plaintiff-in-error) by the Secretary of State of the State of Texas, May 31, 1900.

Said State of Texas further introduced in evidence a certified copy of an affidavit showing the dissolution on May 28, 1900, of the old Waters-Pierce Oil Company, incorporated May 7, 1878, showing that said affidavit of dissolution was duly filed in the office of the Secretary of State of the State of Missouri, May 29, 1900, and in the office of the Secretary of State of the State of Texas, May 31, 1900. Evidence was further introduced to show that a permit to do business in Texas theretofore issued to the old Waters-Pierce Oil Company, incorporated in 1878, was on June 15, 1897, cancelled by the judgment of the District Court of Travis County in a suit by the State of Texas against said company, and the said judgment was affirmed by the Supreme Court of the United States, March 19, 1900.

The State of Texas further offered in evidence the deposition of **Ida M. Butts**: That she was the administratrix in the estate of George Rice, who died in 1905; that said George Rice was at the time of his death the owner of certain certificates of the Standard Oil Trust, and that as administratrix she had come into possession of one such certificate; she further testified (over objections of defendant, plaintiff-in-error herein) that after a suit brought by the Attorney General of the State of Ohio in said state to oust the said Standard Oil Company of Ohio from further participation in the Standard Trust Company or to cause it to cease to do business in the State of Ohio if it remained in

said Trust, was decided in favor of the State of Ohio, "the Standard Oil Trust pretended to go out of business," and they then increased the capital stock of the Standard Oil Company of New Jersey and made it to all intents and purposes the same sort and character of organization in effect as had been the Standard Oil Trust—that is, they made it the holding company of all the companies hitherto included in said Standard Oil Trust. The witness further testified (over objections of defendant, plaintiff-in-error) that in 1896, there were twenty companies in the great grand division of the trust, to-wit: The Atlantic Refining Company, Standard Oil Company of Kentucky, the Buckeye Tank Line Company of Ohio, the New York Transit Company of New York, the National Transit Company of Pennsylvania, Solar Refining Company of Ohio, the Northwestern Natural Gas Company of Ohio, the Union Pipe Line Company of New York, the Southern Pipe Line Company of Pennsylvania, the Northern Pipe Line Company of Pennsylvania, the Eureka Pipe Line Company of West Virginia, the Indiana Pipe Line Company of Indiana, the Standard Oil Company of Indiana, the Standard Oil Company of New York, the Standard Oil Company of New Jersey, the Standard Oil Company of Ohio, the Ohio Oil Company of Ohio, the Forest Oil Company of Pennsylvania, the Southern Pennsylvania Oil Company of Pennsylvania and the Anglo-American Oil Company, Limited.

The witness further testified that fractional certificates of the shares of stock for each of the companies above mentioned were issued to J. L. Kemper, in lieu of certain of the aforesaid Standard Oil certificates held by the said George Rice, copies of which certificates were attached to her said deposition. There was also attached to said deposition as an exhibit, a certificate signed by the trustees of the Standard Oil Trust by W. H. Tilford, attorney in fact, dated November 15, 1899, showing that George Rice was the owner of the equitable title of 1-9725 of the amounts of the corporate stocks held by the trustees of the Standard Oil Trust in each of the corporations whose stocks were held by said Trust on the first day of July, 1892, and which equitable ownership was represented by one share of Standard Oil Trust surrendered for cancellation and directing the officers of the several corporations included in the said Trust as aforesaid to issue certificates for said interest.

State of Texas further offered in evidence the deposition of **R. H. McNall:** That H. M. Tilford was in the oil business and connected with the Continental Oil Company, doing business in the western part of the United States with the head office at Denver, and was also connected with the Standard Oil Company of San Francisco and that the Continental Oil Company did business in Colorado, Utah, Montana, New Mexico, Idaho and Arizona, and that the Standard Oil Company of San Francisco did business in Washington, Oregon, California, Nevada, and he thought in Arizona.

E. M. Wilhoit testified by deposition for the State as follows: That he was agent at Topeka, Kansas, for something like four years for the Standard Oil Company of (he thought) Kentucky, and stated that this was the same company that did business in Missouri, but he did not state within what years he acted as such agent. He further testified that prior to representing said Standard Oil Company at Topeka, he had been the agent for the Standard Oil Company at Wichita, Kansas, but did not state within and at what time he had acted as such agent. He further testified that the Consolidated Tank Line Company was absorbed by the Standard Oil Company, and that he was employed by said Consolidated Tank Line Company at the time of such absorption. He further stated that the Indian Territory was not in the Territory in which the Standard Oil Company and the Consolidated Tank Line Company did business from and out of Wichita, Kansas, but that he sometimes had taken orders from the Indian Territory and had labeled such goods with Waters-Pierce Oil Company's labels and had charged such goods to the Waters-Pierce Oil Company. He further testified that during two different years (without stating what years) he traveled and took orders for the Consolidated Tank Line Company or the Standard Oil Company in the Panhandle of Texas, and was instructed to shade prices liberally to secure orders, as it was in the territory of the Waters-Pierce Oil Company, and that upon requesting that he be allowed to make such trip for the third season, he was informed that the Waters-Pierce Oil Company had "gotten on to them" so that they could make no further shipments into that territory. Said witness further testified that in certain portions of Mis-

souri, the Standard Oil Company did not do business, and the Waters-Pierce Oil Company did do business, and that in other portions of said state the Waters-Pierce Oil Company did business and the Standard Oil Company did not; the Standard Oil Company did business in Kansas, and the Waters-Pierce Oil Company did not; that the Waters-Pierce Oil Company did business in the Indian Territory, and the Standard Oil Company did not.

Charles F. Hatfield testified for the State by deposition as follows: That prior to 1889 he had been the private secretary to Col. W. P. Thompson, and fro that year to November, 1904, he had worked in different capacities for the Waters-Pierce Oil Company, that while he was private secretary to Col. Thompson, a dispute arose between the Waters-Pierce Oil Company and the Consolidated Tank Line Company with reference to whose territory a certain county in Missouri was in, and that this matter was finally referred for adjustment to Col. Thompson in New York, and that he made a map showing the dividing lines in Missouri, that a copy of such map was retained in the office of New York, and one sent to each of the aforesaid companies. He further testified that he had been employed at 26 Broadway, New York, while with Col. Thompson, prior to 1889, and that during that time several different companies were represented there by various officials connected with various employes such as the Domestic Trades Committee, Manufacturing Committee, Lubricating Oil Committee, Cooperage Company; that all of said committees reported to the Executive Committee of which, according to general understanding, John D. Rockefeller was Chairman; that Col. Thompson represented the Consolidated Tank Line Company, the Waters-Pierce Oil Company and other companies; that H. A. Hutchins represented the Standard Oil Company of Chicago, Cleveland and some others, and that H. M. Tilford largely represented the Western Companies like the Continental and San Francisco interests.

Mr. H. Clay Pierce testified by deposition on behalf of the State of Texas as follows: That he was at the time of testifying, September 10, 1906, Chairman of the Board of Directors of the Waters-Pierce Oil Company, organized in Missouri in 1900; that during the fall and winter of 1877 and 1878, he organized and incorporated under the laws of Mis-

souri the first Waters-Pierce Oil Company and that it succeeded to the business and property of Waters, Pierce & Co.; that the original capital stock of said Waters-Pierce Oil Company was $100,000, of which Waters, Pierce & Co. subscribed for 40 per cent, Horace A. Hutchins and William P. Thompson 40 per cent and Chess-Carley & Company of Louisville, Kentucky, 20 per cent, and that the first officers of said first Waters-Pierce Oil Company were William H. Waters, Director and President; H. Clay Pierce, Director and Vice-President; Charles M. Adams, Secretary and Treasurer; Horace A. Hutchins, Director; William P. Thompson, Director, and Francis D. Carley, Director. Witness further testified that some time after the organization of the Waters-Pierce Oil Company, the stock belonging to Messrs. Hutchins and Thompson and Chess-Carley & Company was transferred to the trustees of the Standard Oil Company, and that the witness (Mr. Pierce) purchased the interests of William H. Waters in the 40 per cent belonging to Waters-Pierce & Company. He further testified that when the license of the first Waters-Pierce Oil Company was revoked by the State of Texas, he (Mr. Pierce) was told by a prominent citizen of the State of Texas that the people of that state would not tolerate the methods of the Standard Oil Company, and that no corporation controlled by the Standard Oil Company would be permitted to do business in Texas; that he explained the situation fully to the Executive Committee of the Standard Oil Company, and they agreed that he should organize a new company, the stock of which should be held by him (Mr. Pierce), and that he should manage and control the company absolutely free from any dictation or direction on the part of said Standard Oil Company.

He further testified that up to the spring of 1904, the Standard Oil Company had made no attempt to interfere in any way with his management and control of the Waters-Pierce Oil Company, but that sometime in the spring of 1904, the Standard Oil Company transferred the stock which had stood in his (Mr. Pierce's) name to M. M. Van Buren, and began in other ways to assume control over the affairs and operations of the company; that he protested against this conduct as a violation of their agreement with him and as contrary to the representations he had made to the people of the State of Texas.

Mr. Pierce further testified that in 1878 when he organized the first Waters-Pierce Oil Company, its predecessors, Waters, Pierce & Company and H. C. Pierce & Company, had already an established business in all of the territory in which the Waters-Pierce Oil Company now operates, and that it was agreed between him and the representatives of the Standard Oil Company of Ohio, that being the only Standard Oil Company of which he knew anything at the time, that said first Waters-Pierce Oil Company should confine its operations and transact its business within the territory in which its predecessors, Waters, Pierce & Company and H. C. Pierce & Company, had heretofore transacted their business, and that a map was made showing such territory, including a portion of Illinois, a portion of Missouri, a portion of Louisiana west of the Mississippi River, the State of Arkansas, what is now the Indian Territory and Oklahoma, the State of Texas, and the Republic of Mexico, and that ever since said time the Waters-Pierce Oil Company had confined its operations to building up its trade in that particular territory; that the present Waters-Pierce Oil Company was organized in 1900, and succeeded to the established business of the old Waters-Pierce Oil Company, and since that time had confined its operations exclusively to building up the business in the territory occupied by its predecessor, the old Waters-Pierce Oil Company.

Mr. Pierce further testified that in the year 1892, the directors of the old Waters-Pierce Oil Company consisted of Messrs. H. Clay Pierce, A. M. Finlay, H. M. Tilford, C. M. Adams, and J. P. Gruet, and that this Board of Directors continued until the dissolution of the old Waters-Pierce Oil Company in 1900; that upon the organization of the present Waters-Pierce Oil Company in 1900, the Board of Directors then elected consisted of the witness, H. Clay Pierce, and A. M. Finlay, C. M. Adams, J. P. Gruet and J. D. Johnson, and that this Board of Directors continued until the year of 1904, when W. F. Taylor took the place of J. D. Johnson and R. P. Tinsley that of J. P. Gruet. The witness further testified that the Waters-Pierce Oil Company purchased almost all of its supplies of the Standard Oil Company, and it depended upon the Standard Oil Company for almost all of its supplies, and that neither the present nor the old Waters-Pierce Oil Company had ever attempted to extend business beyond the territory above

named and in which it did business, and that the reason, therefore, was because he (Mr. Pierce) as Manager, did not deem it expedient to do business beyond the territory wherein the Waters-Pierce Oil Company was thoroughly and fully equipped and did not contemplate extending such business for the reason that the original Waters-Pierce Oil Company had agreed that it would confine its operations to the territory in which it and its predecessors had transacted business, and that this agreement was made with Col. O. H. Payne as the representative of the Standard Oil Company of Ohio, and that as a result of this agreement the Waters-Pierce Oil Company had confined its business to certain territory, but that he had not and never had had any means of knowing the reasons for the operations of the Standard Oil Company. He further testified that on the organization of this plaintiff-in-error, May 29, 1900, he subscribed and paid for the entire capital stock, but subsequently at the request of Mr. W. H. or H. M. Tilford, he transferred in blank 2748 shares of this stock, and delivered the certificate to Mr. Garth, the transfer being made pursuant to what his attorney informed him was the agreement at the time of the formation of the present Waters-Pierce Oil Company, but that this stock remained on the books of the company in his (Mr. Pierce's) name until some time in June, 1904, when it was transferred on the books of the company to M. M. Van Buren; that W. H. Tilford and H. M. Tilford were connected with the Standard Oil Company and were members of the Domestic Trades Committee of the Standard Oil Company.

Mr. Pierce further testified that according to his understanding these 2748 shares which he transferred and delivered to Mr. Garth belonged to and were to be transferred to the Standard Oil Company or its representatives, and that any dividends upon said shares which came into his possession were transferred by him to the Seaboard National Bank of New York, as he understood for the Standard Oil Company; that the reason the ownership by the Standard Oil Company of said 2748 shares did not appear upon the books of the company when it was organized—that is, the personal reasons of the witness were that it had been agreed by his attorney and the general counsel of the Standard Oil Company that the stock should stand in his name for the

purpose of enabling him (Mr. Pierce) to own, control and operate the said Waters-Pierce Oil Company; that he had the understanding through his attorney that he was to remain the owner of record of said stock, and to control the company and to continue to do so as long as the stock remained in his name. Witness further testified that in 1904 after the Standard Oil Company had caused such 2748 shares to be transferred on the books of the company to M. M. Van Buren, said Standard Oil Company began to assume control over the affairs of the Waters-Pierce Oil Company by ousting directors that had been elected by the witness and substituting those of the Standard Oil Company's own selection, and by sending men to manage the Waters-Pierce Oil Company. Witness further testified that the Standard Oil Company audited the books of the old Waters-Pierce Oil Company whenever it saw fit to do so, and that the old Waters-Pierce Oil Company sent reports of its business to the Standard Oil Company, but the witness did not personally know that the books of the present Waters-Pierce Oil Company (plaintiff-in-error herein) had ever been audited by the Standard Oil Company from the time of the organization of the present Waters-Pierce Oil Company up to 1904. He further testified that after the present company was organized, the reports and communications were sent to R. H. McNall, 26 Broadway, New York, instead of to the various heads of the departments of the Standard Oil Company, as had been the case during the existence of the old Waters-Pierce Oil Company; that Mr. McNall had been clerk in the office of H. M. Tilford, and was selected for this position because of his familiarity with the business and that the purpose was to facilitate business, avoiding the delays of receiving and transmitting orders, and that McNall was to reside in New York, with his office at 26 Broadway, the home of the Standard Oil Company, and through him all communications of the various Standard Oil Company's interests would be transmitted, and that after McNall's appointment to this position, which was styled "commercial agent," he continued to maintain his office in that of Mr. Tilford's. Witness testified that he did not know until he read it in the newspapers that McNall's mail was directed to him at 75 New street, and that he did not know why this was done.

Mr. Pierce further testified with reference to the reports

made by the Waters-Pierce Oil Company to the Standard Oil Company through Mr. McNall that "the different heads of the different departments of the Standard Oil Company in New Jersey were in the habit of communicating through Mr. McNall their desires and, as the Manager of the Waters-Pierce Oil Company, it was my understanding that the heads of departments requested such information as the Standard Oil Company of New Jersey, who was a majority stockholder in the Waters-Pierce Oil Company, desired to have and recognizing the right of the largest stockholder in the company to have such information concerning its operation as it desired, I very readily instructed the various heads of the departments of the Waters-Pierce Oil Company to send such information as was asked for."

Mr. Pierce further testified that H. M. Tinsley came to St. Louis in April, 1904, to assume charge of the Accounting Department of the Waters-Pierce Company, as successor to Mr. J. P. Gruet and remained until some time in April, May or June, 1905, that Mr. Tinsley did not come to St. Louis to take charge of the business of the Waters-Pierce Oil Company, but under the agreement between the witness (Mr. Pierce) and W. H. Tilford, representing the Standard Oil Company, Mr. Tinsley was appointed to succeed Mr. Gruet as the auditor or comptroller of the Company, and to have to do only with the books and accounts of the company, and both agreed that under no circumstances was he to interfere with the management of the company. Witness stated that at this time Mr. Finley was president of the Waters-Pierce Oil Company, and Mr. Tinsley was given the title of Vice-President to supply the position made vacant by the retirement of Mr. Gruet; that when Mr. Tinsley came to St. Louis he was assigned by Mr. Finley to the position in reference to the books and accounts which had been made vacant by the retirement of Mr. Gruet, and that Tinsley at first made no objection to taking charge of the books, but finally refused to take charge thereof; that Mr. Finley, on account of his health, was compelled to go abroad some time in May or June, 1905, and that immediately upon Mr. Finley's departure Mr. Tinsley assumed charge of the Waters-Pierce Oil Company in all its departments; that Mr. Tinsley proceeded at different dates to remove old and important officers and employees of the company and heads of departments and

substituted others in their places; that when this information was brought to the knowledge of the witness he protested to the officials of the Standard Oil Company against the unwarranted action of Mr. Tinsley in violating the agreement.

The witness, Mr. H. Clay Pierce, further testified by deposition, the same being offered by defendant below (plaintiff-in-error), as follows: That he (Mr. Pierce) was not and never had been a shareholder in the Standard Oil Company of New Jersey, and did not and never had owned any stock in any oil company other than the Waters-Pierce Oil Company; that when the Standard Oil Trust was organized he (Mr. Pierce) was urged to place the Waters-Pierce Oil Company in the Trust, but refused to do so; that when the first Waters-Pierce Oil Company was organized, it was agreed by all parties interested that the witness should control and direct its policy, and that he constantly continued to do so from the date of its organization until February, 1900, when ill health compelled him to retire as President of the company, and he elected his brother-in-law, A. M. Finlay, as his successor. He further testified that when the present Waters-Pierce Oil Company was organized in order that the company should conduct its business in accordance with the laws of every state in which it was operating, he placed the attorney of the company on its executive committee with instructions to examine all reports and transactions to the end that no law should be violated; that after frequent interviews and discussions with reference to the action of the Standard Oil Company in transferring the stock to M. M. Van Buren, the management and control of the company was again committed into the hands of the witness, and that his son, Clay Arthur Pierce, was then the president of the company, and was conducting it as an independent business. Mr. Pierce further testified that the volume of business of the present Waters-Pierce Oil Company was so great that it would have been impossible for it to obtain supplies sufficient to meet its requirements from any other source than the Standard Oil Company, and that he felt sure that at the time of testifying (September, 1906), it could not do so; that the Waters-Pierce Oil Company was not interested in any oil wells or oil producing property within the United States. Witness further stated that the Waters-Pierce Oil Company had

never had any agreement or understanding with the Republic Oil Company, the Standard Oil Company or any other company or person for the purpose of fixing or intending to fix the price at which any of the products of petroleum should be sold on the market.

Mr. Pierce detailed the developments of the oil business by himself and the Waters-Pierce Oil Company, the improvements in the methods of delivery of oil, the substitution of tank stations and direct deliveries to consumers and dealers in tank wagons and in tin cans in place of the old method of shipping in wooden barrels and detailed the consequent saving in the conveyance of oil to the purchasers by said improved system.

In answer to the question as to why the Waters-Pierce Oil Company did not buy oil from independent refineries, the witness answered "as a rule the oils produced by the independent refineries were of inferior quality and were produced in such small quantities by each independent; although the aggregate was considerable, that it would have made it much more expensive for the Waters-Pierce Oil Company to have supplied its trade from a great many sources as against the one."

The State of Texas further offered in evidence the deposition of **Mr. Wade Hampton** as follows: That he (Mr. Hampton) was the general auditor of the accounts of different companies, among others, the Standard Oil Company of New York, the Atlantic Refining Company, and the Standard Oil Company of Indiana. Witness testified in some detail as to the auditors in his office being sent by him at different times to audit books of the Waters-Pierce Oil Company. In view of the admission by defendant below (plaintiff-in-error herein) of the fact that auditors of the Standard Oil Company did audit the books of the Waters-Pierce Oil Company from time to time, it is not deemed necessary to give more of the details of the testimony of this witness. The evidence showed that these auditors were paid by the Waters-Pierce Oil Company for the time employed in making such audits. As to this, the witness, H. C. Pierce, in his testimony testified that the payment of these auditors by the Waters-Pierce Oil Company was without his knowledge and certainly would have been stopped by him if he had known it.

The State further introduced in evidence certain letters written by Mr. Wade Hampton of the Waters-Pierce Oil Company dated respectively February 8, 1901, February 8, 1902, November 12, 1902, November 24, 1902, and November 10, 1903, and advising with reference to auditors going to audit the books of the Waters-Pierce Oil Company, and asking that such auditors be placed on the pay-roll of said company during the time so employed, and stating the salaries to be paid them; the first of such letters—the one dated February 8, 1901—stated that "for reasons which you undoubtedly will appreciate, it is best that Mr. Conrey (auditor) be considered an employee of your company during his examination." The state further introduced a letter from the said Hampton to H. C. Pierce, President of the Waters-Pierce Oil Company, dated July 7, 1899, relating to the auditing of the books of the old Waters-Pierce Oil Company. These letters appear in the record page 533.

The State of Texas further offered in evidence the deposition of **Maywood Maxon** as follows: That he had been engaged in the oil business most of his life, and had worked for different companies, that he knew Alexander McDonnell, who was President of the Consolidated Tank Line Company and afterwards President of the Standard Oil Company of Kentucky, that the Standard Oil Company of Kentucky had an office at 26 Broadway, New York, and that he (the witness) was Manager at one time for the Iowa Tank Line Company at Davenport, Iowa, that said company sold Standard Oil Company's oils except turpentine, that the Iowa Tank Line Company made reports to H. R. Payne, Secretary, 26 Broadway of the movement of Union Tank Line cars, that the Iowa Tank Line Company did business in the City of Trenton, Mo., and that the Consolidated Tank Line Company was not allowed to sell at Trenton, that the Consolidated Tank Line Company absorbed the Iowa Tank Line Company about 1885, that the Consolidated Tank Line Company went into the Standard Oil Company of Kentucky, and that he was its manager until December 31, 1902, that as manager he was not allowed to sell oils in the territory of the Waters-Pierce Oil Company in Illinois, that the Standard Oil Company of Kentucky had a storage and shipping depot in East St. Louis, under his jurisdiction, but that all orders or in-

quiries from such territory were referred to the Waters-Pierce Oil Company.

G. J. Steigerwald testified by deposition for the State of Texas as follows: That he was in the oil business with the Fred G. Clark Company; that his first connection with the oil business was as clerk for Schofield, Schurmer & Teagle of Cleveland, Ohio, from March 4, 1891, to January, 1901; that he was next secretary and treasurer of the Scio Refining Company with which company he remained until June 1st, 1901; that he was afterwards with the Republic Oil Company; that the said Republic Oil Company acquired the refinery of the Scio Oil Company; that the Republic Oil Company was located at Cleveland, Ohio, with distributing branches throughout the middle west and lake states and that he continued with the Republic Oil Company until April 15, 1904; that while the Scio Refining Company and Scofield, Schurmer & Teagle were in business they sold in practically each of the United States and that Scofield, Schurmer & Teagle were not large dealers in the State of Texas, but that in the States of Ohio, Michigan, Indiana, Nebraska and some adjacent territory they were the largest and most aggressive competitors of the Standard Oil Company and of the Waters-Pierce Oil Company in the territory allotted to them; and that they competed in the distribution of oil by establishing branch houses and shipping therefrom in barrels and distributing by tank wagons. The witness further testified as to reports made by the Republic Oil Company to 26 Broadway, New York, and that the business of the Republic Oil Company was that in the territory in which it operated, as above stated, it was to secure and supply the trade of those who were dissatisfied with or prejudiced against the Standard Oil Company or its subsidiary companies and that it did not enter into active competition with the Standard Oil Company; and that a station of the Republic Oil Company formerly maintained by Scofield, Schurmer & Teagle at Springfield, Missouri, in the territory of the Waters-Pierce Oil Company was closed by instructions of the President of the Republic Oil Company and the equipment removed from Springfield to Kansas City, Missouri.

The State of Texas further offered in evidence the deposition of **A. H. Gardner**, who testified as follows: That

he was in the oil business in Kansas City, Missouri, and had lived there for fourteen years prior to which time he had lived at Denver, Colorado; while at Denver, he had been in the employ of the Continental Oil Company which sold oil in various northwestern states but did not enter into competition with or sell oil in any territory in which the Waters-Pierce Oil Company sold oil; that the Continental Oil Company made reports to H. M. Tilford, 26 Broadway, New York; that after going to Kansas City he entered the employ of the National Oil Company which said company was not in any way connected with the Standard Oil Company's interest; that Scofield, Schurmer & Teagle were in business in Kansas City and continued there until about five years before; that he had not in the conduct of his business in Missouri met the Waters-Pierce Oil Company and the Standard Oil Company as competitors in the same place.

The State of Texas further offered in evidence the deposition of **Edward P. Pratt** as follows: That he lived at Kansas City, Missouri, and had lived there since 1892, and that from 1882 to 1892 he lived at Des Moines, Iowa; that while living in Des Moines he was an officer of the Des Moines Oil & Tank Line Company and that this Company was sold to the Consolidated Tank Line Company; that he was manager of the Consolidated Tank Line Company at Des Moines until March, 1892; that there was in Missouri a dividing line between the territory in which the Consolidated Tank Line Company did business and the territory in which the Waters-Pierce Oil Company did business; that the Consolidated Tank Line Company was succeeded by the Standard Oil Company of Kentucky in 1896 and afterwards by the Standard Oil Company of Indiana, and that he was respectively manager for each of these companies in Kansas City and that there was no change in the territory in which they did business from that in which the Consolidated Tank Line Company had done business; that while he was manager at Kansas City of the Consolidated Tank Line Company and the Standard Oil Company of Kentucky and Indiana, if an order was received from a dealer in the Waters-Pierce Oil Company's territory, such order was either sent to the Waters-Pierce Oil Company at St. Louis or the shipment was made by the Consolidated

Tank Line Company which reported the sale to the head office of said company at Cincinnati; while he was manager at Kansas City he did no business in Texas, because it was not in his territory.

The State of Texas further offered in evidence the deposition of **A. V. Jockel** as follows: That he was employed by the Standard Oil Company of New Jersey from June, 1904, until December, 1904, in the capacity of bookkeeper; that he worked for the Waters-Pierce Oil Company at Oklahoma City, Oklahoma Territory, from December, 1904, to February, 1905; that in November, 1904, he was informed by the manager of the Newark branch of the Standard Oil Company of New Jersey that his transfer had been requested to some western agency and that Mr. King desired his presence at 26 Broadway, New York, the following day; that he was given a letter of introduction to Mr. King which he presented and Mr. King introduced him in turn to Mr. R. H. McNall with whom he made all arrangements regarding his transfer to the Waters-Pierce Oil Company; that about a week later he left New York for St. Louis and saw Mr. Tinsley whom Mr. McNall had directed him to see before going to Oklahoma City; that he made his final arrangements with Mr. Tinsley and then left for Oklahoma City; that the duties of Mr. King were merely the auditing of the monthly reports of the Waters-Pierce Oil Company sent to the St. Louis office; that before going with the Waters-Pierce Oil Company, Mr. Young, the manager of the Standard Oil Company at Newark, New Jersey, instructed him not to mention the fact that he had been with the Standard Oil Company; that the oils sold by the Waters-Pierce Oil Company at Oklahoma City were obtained from the Standard Oil Company of Indiana and from the Galena Oil Company.

The State of Texas further offered in evidence the deposition of **Harry Egbert Platt** as follows: That he resided in New York, and was clerk in the office of W. H. & H. M. Tilford for about two years, beginning in February either in the year 1902, or 1903, that while there he knew Mr. R. H. McNall, who had a desk in H. M. Tilford's room, and that while there he saw reports from the Waters-Pierce Oil Company to R. H. McNall; that Mr. McNall was commercial

agent for the Waters-Pierce Oil Company, and that letters addressed to him were addressed to 75 New Street, New York, which was the rear entrance to the building at 26 Broadway, that various reports received by Mr. McNall were sent to Silas H. Payne and W. E. Bemis, Mr. Bedford and others, all having offices at 26 Broadway, and that it was the custom for letters written at various departments at 26 Broadway to the Waters-Pierce Oil Company to be sent to Mr. McNall to be signed by him.

The State further offered in evidence the deposition of **Albert A. Smith**, as follows: That he resided in Brooklyn, was employed in the office of Messrs. Burt & Goodeno, at 26 Broadway, New York, in May, 1903, in the department known as the Shipping Department, and that in May of the following year, he was transferred to the office of W. E. Bemis where he remained about a year and one-half. Mr. Bemis was a member of the committee known as the Domestic Trades Committee, and was in charge of the department known as the Statistical Department, that reports came to Mr. Bemis from all over the world, and that witness had seen the reports from the Waters-Pierce Oil Company, that these reports were reports of monthly deliveries of oil and different products connected with the business as well as reports of competitive shipments, that letters were dictated to him at Mr. Bemis's office and sent to McNall to be signed, that the letters he wrote were sent in to Mr. McNall to be signed and copied in his book and returned to be mailed.

The State further offered in evidence the deposition of **Francis D. Carley** as follows: That he resided in White Plains, New York, and had been engaged in the oil business from 1865 to 1884, first, with the firm of Chess-Carley & Company, afterwards with the corporation Chess-Carley Company, and afterwards for a few years with the Water-Pierce Oil Company, that the corporation of Chess-Carley Company was engaged in selling oil in Texas. Witness testified that he sold his interests in the Chess-Carley Company to the M. K. & T. Tank Line for stock in the Waters-Pierce Oil Company.

State further introduced in evidence the deposition of **W. N. Davis** as follows: That he resided in Kansas City, and

was engaged in effecting sales of lubricating oils and other products of petroleum; that he was the manager in Kansas City, and had been with the Keystone Oil Company of Kansas City and the Inter-Ocean Oil Company of Chicago for about nine years; that prior to that time he was connected with the Interstate Oil Company which did business all over the world; that he met the Waters-Pierce Oil Company, the Standard Oil Company, in competition in Missouri, but had never met both companies in the same place; that he had worked for the Consolidated Tank Line Company, and that there was a line in Missouri, between the territory of the Consolidated Tank Line Company and the territory of the Waters-Pierce Oil Company, and that they did not compete; that while connected with the Consolidated Oil Company, there was some controversy over a station at Joplin, Missouri, which he had established, which was afterwards turned over to the Waters-Pierce Oil Company.

State of Texas further offered in evidence the deposition of **William A. Morgan** as follows: That he resided in Sedalia, Missouri, and had been engaged as traveling salesman for the Standard Oil Company of Missouri from December 1, 1898, until October, 1900; that the Standard Oil Company transacted business in certain parts of the State of Missouri, and the Waters-Pierce Oil Company did no business in such parts; that the Standard Oil Company did no business in those parts of the state in which the Waters-Pierce Oil Company did business.

State of Texas further offered in evidence the deposition of **H. R. Knowlenberg** as follows: That he resided in St. Louis, and had been a traveling salesman for the Waters-Pierce Oil Company from about 1893 to about 1898 or 1899, and worked in Illinois and Missouri; that prior to that time he had worked for the Vacuum Oil Company of Rochester, as traveling salesman in the same territory; that the Standard Oil Company purchased the business of the Vacuum Oil Company, whereupon he went to work for the Waters-Pierce Oil Company; that when he made trips in Illinois soliciting business, his reports were sent to the Standard Oil Company at East St. Louis, Illinois, and when he solicited business in Missouri, his reports were sent to the Waters-Pierce Oil Company.

State of Texas further offered in evidence the deposition of **T. R. Hopkins** as follows: That he lived in Lawrence County, Missouri, and had been connected with the Waters-Pierce Oil Company in the capacity of agent at Seneca, Joplin, Webb City and Pierce City, all in Missouri, from 1887 to 1893, and that the Standard Oil Company and the Waters-Pierce Oil Company did not compete with each other in the State of Missouri.

State of Texas further offered in evidence the deposition of **Mr. R. H. McNall** as follows: That he resided in Greenwich, Connecticut, and had an office at 26 Broadway, New York, where he had been for about twenty years, that he had worked for the Pratt Manufacturing Company for about ten years, and afterwards for the Standard Oil Pratt Works, and then with Mr. Tilford as an assistant, and had remained with him for about five years until some time in the year 1900, when he was employed by the Waters-Pierce Oil Company to look after such business as they might give him in New York City, being given a little later the title of Commercial Agent, and at this time he occupied a desk in the office of H. M. Tilford; that his mail was addressed to 75 New Street, the rear entrance of 26 Broadway; that he attended to making purchases for the Waters-Pierce Oil Company, received reports and wrote letters to the Waters-Pierce Oil Company; that some of the reports received by him were submitted to and examined by different persons at 26 Broadway, and that he signed and mailed the Waters-Pierce Oil Company various letters written in other departments at 26 Broadway, and that such letters were marked with the initial of the person writing the same, namely, "S. H. P.," representing Silas H. Payne; "T. H. W.," T. H. Wheeler; "W E. B.," W. E. Bemis;" "H. M. T.," H. M. Tilford. "C. E. B.," C. E. Bedford; "W. H. T.," W. H. Tilford.

Witness further identified various letters from him to the Waters-Pierce Oil Company to the different officers thereof, which said letters are attached to his deposition, and copies are found on page 605 ff. of the record herein. These are letters relating to requests for notices of dividends as declared by the Waters-Pierce Oil Company, changes of salaries in Mexico, advances in salary, sugges-

tions as to bookkeeping, requests for monthly reports and various other matters of information with reference to the conduct of the business, and letters acknowledging receipts of information, receipts of letters, reports from the Waters-Pierce Oil Company and one letter from the witness, R. H. McNall, to S. Johnson, St. Louis, dated March 24, 1904, suggesting that the Waters-Pierce Oil Company's minimum selling price on crude scale wax should be certain prices, stated in the letter, F. O. B. cars Cleveland, Ohio, Whiting, Indiana or New York, stating that while the price named was suggested as a minimum price, he did not want to try to get anything above these prices if by so doing any business might be jeopardized and further stating that on all orders received after that date the billing price of the Waters-Pierce Oil Company would be one-half cent below the price suggested. None of said letters, however, contained any suggestion as to the price at which the Waters-Pierce Oil Company should sell any article dealt in by it except this one letter making the suggestion with respect to the selling price of crude scale wax.

Witness testified that he was in the employ of the Waters-Pierce Oil Company from the spring or summer of 1900, until the spring of 1906, during all of which time his office was at 26 Broadway, New York, and that among other things he conducted correspondence passing between the Standard Oil Company and the Waters-Pierce Oil Company, and for the Standard Oil Company in regard to the business of the former such as reports of sale, dividends and general information with reference to the conduct and result of the business of the Waters-Pierce Oil Company, and that during this time he wrote letters to the Waters-Pierce Oil Company at the dictation of the various heads of the departments of the Standard Oil Company.

The State of Texas further introduced in evidence other letters written by the witness, R. H. McNall, to different officers of the Waters-Pierce Oil Company, which letters related to prices of the Standard Oil Company of oil and other products at their different refineries, requests for information as to the business of the Waters-Pierce Oil Company, and that of competitors and suggestions as to systems of bookkeeping and requests for reports, etc. None of these letters contained any suggestion as to the price at which the Waters-Pierce Oil Company should sell its prod-

ucts or any of its commodities in which it dealt; one of these letters was admitted in evidence dated January 30, 1908, relating to the bill of the Waters-Pierce Oil Company against the Standard Oil Company, Marine Department, calling attention to the fact that the price of one of the articles was not given in the bill, returning the bill and asking that the price of the article be furnished. From the letter it appeared that this was for goods delivered by the Waters-Pierce Oil Company to some ship.

The State of Texas further offered in evidence the deposition of **S. K. Wheeler,** who testified that he was Assistant General Manager of the Waters-Pierce Oil Company, and was General Representative of the company from November, 1903 to 1905, that the prices at which the Waters-Pierce Oil Company sold its products and commodities in which it dealt were fixed by the General Manager in consultation with other officers of the company, and that he as Assistant General Manager, had at times participated in said consultation in the absence of the General Manager himself; that the factors entering into the fixing of prices were the cost of the article, competition at the point of selling and the judgment of the officers as to the price the article should bring in case there was no competition, and that prices were often raised or lowered unaffected by competition.

Clay Arthur Pierce testified for the State by deposition as follows: That he was thirty-three years old, and was President of the Waters-Pierce Oil Company; having been such since June, 1905, and that he had actively discharged the duties as President of the Company and managed and controlled its affairs as far as a President could do so; that his duties had been that of executive head of the company, managing its business affairs and all details connected therewith, and to take final executive action on all business of any nature pertaining to the company; that he had succeeded A. M. Finlay as President of the Waters-Pierce Oil Company; that he was first employed by the old Waters-Pierce Oil Company in the spring of 1898 as Assistant Treasurer, and was re-employed as such by the new company when it organized in 1900, and that he continued in that position until June, 1905, at which time he was elected President; that two months previous to that time he had

been made Acting President and occupied the position as such; that his duties as Assistant Treasurer were such as naturally fall to that position, and in addition he sat in the Executive Committee of the company as the Secretary of that committee, and was a member of that committee from the time of its formation until the same was disbanded; that as he remembered the Executive Committee was organized in 1900, and existed from that time until the fall of 1904; that since the organization of the Executive Committee he had usually been one of three who had determined and fixed the selling price at which the company sold its commodities in Texas; that when requisitions for supplies for the Waters-Pierce Oil Company were ordered sent from the refinery of the Standard Oil Company at Whiteing, Indiana, such requisitions were sent direct to Whiteing, Indiana, and the same was true with reference to requisitions on the Atlantic Refining Company, Sugar Creek Refining Company and all the other refineries; that when requisitions for supplies were made on the Security Oil Company, at Beaumont, they were sent direct to that company at Beaumont; that the Waters-Pierce Oil Company received a small amount of gasoline from Whiteing, Indiana, or Sugar Creek, or Neodesha, for its business in Texas, but that the bulk of the supplies of the Waters-Pierce Oil Company in Texas were received from the Corsicana Refinery and the Security Oil Company at Beaumont; that for Texas, Louisiana, Oklahoma, Indian Territory and the Southern part of Arkansas, the Waters-Pierce Oil Company purchased what it could from the Gulf Refinery and the Texas Refinery; that the Waters-Pierce Oil Company did business in the southern half of the State of Missouri, in a portion of the State of Illinois, immediately east of the Mississippi River, and all of Arkansas, all of Texas and all of Oklahoma and Indian Territory, a portion of Louisiana west of the Mississippi River, and in all the Republic of Mexico; that the Standard Oil Company had certain contracts with steamship lines entering Texas ports to supply the same with oil, and that the Waters-Pierce Oil Company furnished such ships with supplies whenever requested on account of the Standard Oil Company, and charged the same to the Standard Oil Company, and that the prices for such sales were made by the lubricating department of the Waters-Pierce Oil Company, and these prices were fixed

by the head of the lubricating department of the Waters-Pierce Oil Company, the Executive Committee and the Advisory Board not doing so. The witness further testified that R. P. Tinsley was elected Vice-President of the Waters-Pierce Oil Company April 28, 1904, and that he resigned June 22, 1905; that Mr. A. M. Finlay was elected President February 18, 1904, and served until June 22, 1905; that Mr. Tinsley came to the home office of the Waters-Pierce Oil Company and assumed the duties of Vice-President some time in April, 1904, and left about the end of April, 1905, nearly two months before he actually tendered his resignation. Witness further testified that from the time of his connection with the Waters-Pierce Oil Company, his father, H. Clay Pierce, had been Chairman of the Board of Directors, and that such matters as witness had found it advisable to refer to him for final decision were decided by him and thereafter handled entirely in accordance with his ideas, and that so far as he could recall the same procedure was followed by A. M. Finlay when he was President; that at the time Mr. Tinsley was in St. Louis, the witness had nothing to do with the fixing of prices, and does not know how such prices were fixed; that from the time of organization of the company down to the time Mr. Tinsley came to St. Louis, in 1904, H. Clay Pierce directed the general business of the company and carried it out through the other officers of the company, and that he continued to do so after Mr. Tinsley left. Witness further testified that without actually knowing he had understood that the Standard Oil Company owned about two-thirds of the stock of the Waters-Pierce Oil Company, and that as such owner the said Standard Oil Company had the right to ask for such information as a two-thirds stockholder or a majority stockholder would be entitled to, and for that reason statements with respect to the company's business were sent to the Standard Oil Company at their request. Witness further testified that the lubricating department of the Waters-Pierce Oil Company, from time to time, received requisitions from the Standard Oil Company's marine department to deliver marine oils to certain vessels at Galveston, Texas; that they would state definitely when the vessel would be in port and the amount of oil she would need; that these were vessels with which the Standard Oil Company had contracts for the sale and delivery of marine oils;

that upon such requisitions, the Waters-Pierce Oil Company made deliveries through its lubricating department, and bill these oils to the Standard Oil Company at prices which it had named in the letter to the head of the Waters-Pierce Oil Company's lubricating department; that the witness had adjusted these prices from time to time, the Standard paying in accordance therewith; that the Waters-Pierce Oil Company had nothing to do with the prices charged by the Standard Oil Company to vessels so furnished with oil, and that witness knew nothing about the terms of the contract between the Standard Oil Company and such vessels.

The defendant (plaintiff-in-error herein) introduced a portion of this same witness's deposition not offered by the State of Texas, as follows: That from the organization of the Waters-Pierce Oil Company, up to the time that R. P. Tinsley disbanded the Executive Committee, the prices at which oils were sold were fixed by that Committee. Witness was unable to state how they were fixed during the time Mr. Tinsley was Vice-President; that since the latter's resignation, which was accepted some time during June, 1905, the prices were adjusted by A. M. Finlay, Vice-President; C. P. Ackert, General Manager, and the witness as President of the Company, final adjustment being at all times in the hands of the witness as such President; that since the formation of the Advisory Committee, which was formed some time in the fall of 1906, the prices had been considered by the Advisory Committee, voted upon by them, but always referred to the witness as President for final adjustment; that this Advisory Committee was composed of the witness, Chairman of the Board; A. M. Finlay, Vice-President; C. P. Ackert, General Manager; C. M. Adams, Secretary and Treasurer; Mr. Harris, Manager of the lubricating department, and Mr. Stanley, Comptroller of the company; that the method above set forth was absolutely the only means by which prices were finally fixed during the time he had anything to do with the fixing of prices, and that to his certain knowledge the prices of the company, and at which its goods had been sold, had never been fixed other than as herein stated and that during all the time he had been an officer of the Waters-Pierce Oil Company (plaintiff-in-error herein), it had to his knowledge been managed entirely and absolutely as an independ-

ent concern by its own officers; that during his connection with the company, the Standard Oil Company, as a large stockholder in the Waters-Pierce Oil Company, had received from time to time, reports to which a heavy stockholder was entitled. The Standard Oil Company, from time to time, offered suggestions in line with their own ideas as to the way the Waters-Pierce Oil Company should be managed or the way in which prices should be adjusted, and that these were merely incidental suggestions received from time to time; that where these suggestions met with the views of the management of the Waters-Pierce Oil Company, they were approved and adopted, but in the majority of cases, they were not followed at all. Witness further testified that the Standard Oil Company had nothing to do directly with the fixing of prices or control of business of plaintiff-in-error in any manner, shape or form; that during May, June and July, 1904, after Mr. Tinsley's coming to St. Louis, the Eexecutive Committee continued in existence, and during that time the prices were fixed by the Executive Committee, but that from the dissolution of the Executive Committee, down to the time Mr. Tinsley left St. Louis, witness did not know how prices were fixed. The letter referred to by the witness written by him to the Comptroller of the Waters-Pierce Oil Company with reference to the marine oil prices read as follows: "Dead Sir:—Effective December 1, 1905. You will please charge the Standard Oil Company, marine oil department, prices as follows for all our deliveries to their companies. (Giving prices). The above, you understand, supersedes the former Vice-President, R. P. Tinsley's instruction to you of May 5th, last."

The State of Texas further introduced in evidence the deposition of **Andrew M. Finlay.** Mr. Finlay testified that he was president of the Waters-Pierce Oil Company, plaintiff-in-error herein, up to June, 1905, that is, from February, 1904, until June, 1905; that Mr. Tinsley came into the company some time in April, 1904, and left the last of May or the first of June, following. The witness testified that when a division manager wanted a supply of oil for any part of Texas he would make a requisition upon the general manager at St. Louis and if it was approved it would go to Mr. Adams' department and that Mr. Adams would make out an order on the regular order form and

if the order was to be shipped from St. Louis, it would be sent to the company's works in St. Louis; if the order was to go from the Corsicana Refinery Company or the refinery at Whiteing, Indiana, it would be sent to Mr. Bogardus, the representative of the Standard Oil Company of Indiana, at Chicago. Witness stated that the Waters-Pierce Oil Company determined the points from which its shipments should be made; that after the organization of the Security Company at Beaumont, Texas, orders for oil purchased of the Security Company were sent by the Waters-Pierce Oil Company direct to its agent at Beaumont or Sawyer, Texas, and this agent would place the order with the Security Company or the Gulf Company or the Texas Company. Witness stated that the Waters-Pierce Oil Company purchased the bulk of its supplies for Texas and elsewhere from the Standard Oil Company or its interests; that during the time of the existence of the Executive Committee of the Waters-Pierce Oil Company, he (Mr. Finlay) was a member of said committee and that the prices at which the company sold oil or other commodities in Texas were passed upon first by the general manager of the company or himself and recommendations were then made to the executive committee; when approved by the committee, the prices were promulgated by the general manager. Witness stated that the prime factors in fixing prices were the cost of goods, including freight, marketing and competition; that the prices of oils in the lubricating department were fixed during that time in that department and that it was not true that the Standard Oil Company fixed the prices of oils in the lubricating department of the Waters-Pierce Oil Company; witness stated that when Mr. Pierce employed Mr. McNall he instructed the witness to give Mr. McNall any information or reports that he might ask for and to address him as commercial agent. Witness stated that orders sent to Mr. McNall were not placed by him, but by Mr. Adams; that when McNall was first employed by the Waters-Pierce Oil Company he had his office at 26 Broadway, New York, and communications were addressed to him at that number; that he did not remember when the change of address to 75 New Street was made; that Mr. McNall requested that his mail be sent to the latter address and that he (the witness) referred this to the general coun-

sel for the company who advised against the change, but Mr. McNall insisted upon it.

Witness further testified—this portion of his deposition being offered in evidence by plaintiff-in-error—as follows: That he was the brother-in-law of H. Clay Pierce and was connected with the old Waters-Pierce Oil Company from the time of its organization to its dissolution and had been with the present Waters-Pierce Oil Company since it was organized; that he had been Vice-President in the present company from the time of its organization until 1904 when he was made president and that ever since the organization of this company he had had the active direction and supervising control of the marketing department; that the prices at which the company sold its oil to the trade had been fixed by Mr. Ackert, Mr. C. A. Pierce, Mr. H. C. Pierce and the witness, and that during the time that Mr. Tinsley was in St. Louis, prices were fixed by Mr. Ackert, Mr. Tinsley and the witness. Witness further testified that during the time Mr. Tinsley was in St. Louis he attempted to interfere a good deal with the management of the Waters-Pierce Oil Company, but that he (the witness) as president of the company at the time endeavored to and did run the company as an independent concern; that the manner in which Mr. Tinsley attempted to interfere in the management of the company was by insisting on things being done which were not approved of by the witness, as, for example, in discharging old and tried employees and putting in new men, and Mr. Tinsley made himself so generally disagreeable that his continual nagging broke down the health of the witness, so that in March, 1905, he was compelled by direction of his physician to go abroad and was away until June 1st of that year; that during the time he was abroad Mr. Tinsley was Vice-President and Mr. C. P. Ackert, a cousin of Mr. H. C. Pierce, was general manager of the company, and Mr. Steven Johnson, a brother-in-law of Mr. H. C. Pierce, was manager of the lubricating department. Witness further stated that while he was President of the Waters-Pierce Oil Company the books were audited from time to time by auditors sent there by Mr. Wade Hampton of New York; that these audits occurred at intervals of a year or perhaps a year and a half and were allowed for information of the majority stockholders in New York; that such audits had no relation to the management or control

of the Waters-Pierce Oil Company but were employed simply to show that the books and accounts were in proper condition and correct.

The State of Texas further introduced in evidence the deposition of **Mr. Steven Johnson**, who testified that he had been the manager of the lubricating department of the Waters-Pierce Oil Company for a number of years prior to October, 1906; that he generally fixed the selling prices of lubricating oil sold by the Waters-Pierce Oil Company. He stated that the lubricating department of the Standard Oil Company sometimes made suggestions as to selling prices and that if these suggestions met with the approval of the Waters-Pierce Oil Company, they were adopted, otherwise, they were not. Witness further testified that in fixing the prices of lubricating oils he took into consideration the cost of the oil including freight and the profits that were warranted in order to maintain competition with other dealers; that there never was any understanding between him or his associates in the lubricating department of the Waters-Pierce Oil Company and the Standard Oil Company in regard to the prices at which the Waters-Pierce Oil Company was to sell lubricating oils; that such suggestions as were made by the Standard Oil Company as to prices were adopted if conditions justified; otherwise they were not and that the prices were determined by other conditions, namely, by competition and the prices at which competitors were selling the same kind of oil.

Royer Campbell testified for the State of Texas mainly with reference to a contract between him and the old Waters-Pierce Oil Company and with reference to services rendered by him to the present Waters-Pierce Oil Company, charged in petition of plaintiff to have been illegal. This testimony was withdrawn by the court from the jury and none of the testimony of this witness is considered material to the question here involved.

The State of Texas offered in evidence the deposition of **H. J. Cohn**, who testified that he had worked for the Waters-Pierce Oil Company in St. Louis from April, 1900, until September, 1902; that he was familiar at that time with the territory in which the Waters-Pierce Oil Company did business in Missouri, and that the Standard Oil Com-

pany did not do business in the territory in Missouri in which the Waters-Pierce Oil Company did business, nor did the Waters-Pierce Oil Company do business in Missouri in the territory in which the Standard Oil Company did business. Witness stated that he knew in a business way of the firm of Scofield, Schurmer & Teagle and that they were absorbed by the Republic Oil Company. He stated that prior to going to St. Louis he lived at Marshall, Texas, where he was employed by the Waters-Pierce Oil Company for about eight years in different positions from office boy to salesmen and division auditor, and that during that time the Waters-Pierce Oil Company received the greater part of its supplies from the Standard Oil Company's refinery at Whiteing, Indiana, and the refinery at Corsicana, Texas; that it received its railroad oils from the Galena Signal Oil Company at Franklin, Pennsylvania.

The State of Texas further offered the testimony of the witness **A. W. Clem**, much of which related to the contract alleged in the petition of the State between the witness, the Eagle Refining Company and the old Waters-Pierce Oil Company, to services rendered by witness to the latter company and to the present Waters-Pierce Oil Company. This testimony was withdrawn from the jury by the charge of the court. Witness further testified that he lived in Dallas, Texas; had been engaged in the oil business in that city since about the year 1890; that he had first been in business for himself under the name of the Eagle Refining Company up to 1894, when he sold his business to the old Waters-Pierce Oil Company for whom he worked until its dissolution and that he was in the employment of the present Waters-Pierce Oil Company at Dallas doing business under the name of the Eagle Refining Company up to about December 31, 1903; and that he continued in the employ of the Waters-Pierce Oil Company for about two months after that date, after which time he again went into the oil business for himself and at the time of his testimony was so engaged in the oil business at Dallas, Texas. Over the objections of defendant below, plaintiff-in-error herein, the witness testified to numerous instances of the old Waters-Pierce Oil Company cutting prices for the purpose of destroying competition; that at the time of the trial of this suit below there were in competition with the present Waters-Pierce Oil

Company in the sale of oil at Dallas, Texas, and adjacent territory, the Richardson-Gay Oil Company, the Ira O. Wise Oil Company and the Gulf Refining Company. The witness further testified, over objections of defendant below, that in 1894, after going into the oil business at Dallas, he wrote to the Security Oil Company to quote him prices on oil and that his first letters were not answered; that in 1906 he wrote them for prices on naphtha and that they quoted him about what the market was selling for in Dallas and about two cents above the price he was paying for this product to the Gulf Refinery from whom he had been obtaining it. He further stated that he knew nothing about the extent of the output in Texas of the different refineries.

C. W. Cahoon was further sworn as a witness on behalf of plaintiff below, State of Texas, and testified as follows: That he had worked for the old Waters-Pierce Oil Company in various capacities from about 1888 up to the dissolution of that company and that he had been in the employ of the present company since its organization in the position of manager of the Central Texas Division with his headquarters at Dallas. Witness stated that the principal source of oil supply used by the Waters-Pierce Oil Company in Texas in his division was Corsicana at the time of the trial below, but that up to two months before this time, Neodesha, Kansas, had been the principal source of supply; that he did not know what company or concern owned the refinery at Neodesha; that all his requisitions for oil for use in his division were placed with the Waters-Pierce Oil Company at its St. Louis office; that prior to two months before the trial below the Security Oil Company's refinery at Chaison, Tex., had been a source of supply to his division as well as the refinery at Neodesha, and that at that time his division had received about as much of its supplies from the Gulf Refining Oil Company as from the Security Oil Company. Witness further testified that he had occasion to inform himself as to the probable output of Eupion oil by the Corsicana Refinery and that it was probably one thousand to fifteen hundred barrels per week; that "P. W." oil meant prime white and was a low grade oil and that "S. W." oil meant standard white and was a still lower grade than prime white, but that he could give no estimate of the production by the Corsicana Refinery of "P. W." and "S. W." oils; that at

the time of testifying his division took from eight hundred to one thousand barrels per week of "W. W." or Eupion oil from the Corsicana refinery; that the Waters-Pierce Oil Company in its Texas business handled a very large percentage of the output of the Corsicana refinery and that it had endeavored to take the entire output of that refinery so far as high grade oil was concerned; that in his judgment the Waters-Pierce Oil Company had done approximately eighty per cent of the business done in Texas since its organization in 1900. Over the objections of defendant below, plaintiff-in-error herein, witness further testified that for a period of about sixty days in 1906 the Waters-Pierce Oil Company marketed some "P. W." and "S. W." oil produced at Corsicana under the name of Eupion and that this was done on account of a shortage in the supply of the better oil.

On cross-examination, witness testified as to the method employed by the Waters-Pierce Oil Company in doing business in Texas. He stated that it had a large number of tank stations in that state; that oils were shipped to the various stations in bulk in tank cars and that a large percentage of the deliveries were made by the company in tank wagons and in some of the territory practically all deliveries were made by tank wagons; that the company not only delivered in that way to the local trade but in most places delivered to every little town within a radius of fifteen and sometimes twenty miles from the central station; and that the deliveries were made by delivering direct from the wagon to the tank of the purchaser without any waste or trouble to the purchaser. Witness further stated that the Waters-Pierce Oil Company did not at all times meet reductions in the prices of its competitors though it sometimes did so; but that the company depended largely upon its superior grades of oil and its superior facilities for handling the oils in barrels; that the advantage to a merchant in buying oil from a tank wagon was that he could get oil in such quantities as he required from five gallons up and have it placed in his tank direct by the company, whereas if the oil was permitted to stand in the house in barrels there was considerable loss and if transferred to a tank there was considerable time and labor involved and that a large majority of the retail merchants at this time insisted on having their oil delivered from tank wagons. Witness

further stated that as a rule the Waters-Pierce Oil Company charged no more for oil delivered from tank wagons than if delivered in iron or wooden barrels. Witness further stated that the Waters-Pierce Oil Company had in his territory about eighty-five wagons, tank wagons and can wagons for delivery, and was increasing its equipment in this respect; that it had not been the policy of the Waters-Pierce Oil Company since its organization to cut prices on oil below those quoted by its competitors, but when prices were so cut by competitors, the company cut its own prices whenever it became a question of either meeting the competitor's price or permanently losing the trade, and that the service furnished by the company in its business was such that it could maintain a slightly higher price than its competitors. Witness stated that sometimes discounts were given to jobbers that might make the prices of the Waters-Pierce Oil Company sometimes lower than those of its competitors.

On re-direct-examination by the State, witness testified with reference to discounts given by the Waters-Pierce Oil Company to various customers, the different prices at which oils were sold at different places and concerning details of the different business in Texas, the particulars of which do not affect the question here raised and are not necessary to be set forth.

The State of Texas further offered in evidence the deposition of **E. S. Horn,** who testified as hereinbefore shown that he had been an assistant of Mr. Johnson, in the Lubricating Oil Department of the Waters-Pierce Oil Company, that in said department was handled all sorts and kinds of greases, lubricating oils, wax and things of like character, and that the company had a manufacturing establishment in St. Louis, wherein it compounded cylinder oils and greases, and that it purchased approximately 50 per cent of its lubricating oils from the Standard Oil Company; that it was not a fact that the Standard Oil Company fixed the prices at which the Waters-Pierce Oil Company sold the above named products, purchased by it from the Standard Oil Company, and that the latter company had nothing to do with the fixing of such prices; that if they made any suggestions, they would not carry them out. Witness further testified (this portion of his deposition being introduced

by defendant below, plaintiff-in-error) that with reference to deliveries of lubricating oils to the plant of the Central Coal & Coke Company (Louisiana & Texas Lumber Company) that the Standard Oil Company of Kansas City were negotiating with the purchasing agent of the Central Coal & Coke Company for prices of oil delivered at Kennard, Tex., and that the manager of the Standard Oil Company asked the Waters-Pierce Oil Company to quote them prices for delivery of oil to the Central Coal & Coke Co. at Kennard, Texas, naming the grades of oil wanted, and that the Waters-Pierce Oil Company did quote prices as above to the Standard Oil Company, and that the prices so quoted were accepted, and the Waters-Pierce Oil Company was asked to honor the requisition of the Central Coal & Coke Company and rendered invoices to the Standard Oil Company which paid for the oils delivered in that way.

The State of Texas further offered in evidence the deposition of **C. M. Adams**, who testified as follows: That he was a director of the Waters-Pierce Oil Company; that at the last election of the Board of Directors of the company, he received the proxy of Mr. M. M. Van Buren, with instructions to vote the stock standing in the latter's name, and which further stated that he (Mr. Van Buren) would be pleased to see the whole board re-elected; that the board was composed of Messrs. H. Clay Pierce, Clay Arthur Pierce, M. M. Van Buren, W. F. Taylor, and the witness, C. M. Adams. Witness stated that W. F. Taylor was an attorney belonging to the firm of Carter, Ledyard, Taylor & Company, of New York, and owned one share of stock in the Waters-Pierce Oil Company; that since the organization of the latter company up to some time in June, 1905, with the exception of a period in which Mr. J. D. Johnson had been a member of the Board of Directors, the witness thought it was true that there had always been three members of the Board of Directors, who were supposed to represent the Standard Oil Company.

The following portion of the deposition of Mr. Adams was offered by defendant below (plaintiff-in-error herein). Witness testified that when the present Waters-Pierce Oil Company was incorporated he subscribed for one share of stock, became a director and was made Treasurer of the company, and was a member of the Executive Committee,

during its existence; that the price at which the Waters-Pierce Oil Company sold oils and other products was determined by the officers of the Waters-Pierce Company in charge of the marketing department, and that there had been no limitation in any manner as to the amount and quantity of products sold by the company; that it sold all it could, the amount being determined by the demand.

Witness further stated that there had been no agreement or understanding, so far as he knew, between the Waters-Pierce Oil Company or any of its officers, with any Standard Oil Company, or any Standard Oil interests, regarding the prices at which the Waters-Pierce Oil Company was to sell or had sold its oils, or other products, or regarding the quantity of such oils, or other products sold by the Waters-Pierce Oil Company, and he stated that he thought he was in a position to know if there had been any such understanding or agreement; that nearly all of the refined oils and gasolines sold by the Waters-Pierce Oil Company were ordered through his office. Witness further testified with reference to the reports of the business done by the Waters-Pierce Oil Company, made to the Standard Oil Company through Mr. McNall, that they had no relation to the management of the Waters-Pierce Oil Company's business, but were given simply as a matter of information; that the Waters-Pierce Oil Company's method of procuring supplies of refined oils and gasolines was that the managers would make requisitions for such supplies to the office in St. Louis, these would go to the general manager's office, then to Mr. Finlay, the Vice-President, and from him to the witness, and that the witness thereupon ordered the goods from where they were to be shipped from. Mr. Adams stated that the Chicago office governs the refining at Whiteing, Ind.; Sugar Creek, Mo., and Neodesha, Kansas, and he thought the refinery at Corsicana, Texas; that whenever shipments were to be from the Corsicana refinery, the orders were either sent direct to the Standard Oil Company of Indiana, at Chicago, or to Edward Bogardus, their representative; that neither Mr. Taylor nor Mr. Van Buren, while members of the Board of Directors of the oil company had ever attended a meeting of the Board, and that while Mr. Tinsley was in St. Louis, there was no change in the manner of fixing the prices at which the company sold its products, so far as the witness knew. Mr. Adams further testified (this

portion of his deposition being offered by the State of Texas), that before Mr. Tinsley came into the Waters-Pierce Oil Company, there was an Executive Company which had general control of the business of the company and which fixed the prices at which oils should be sold; that after Mr. Tinsley came, that committee was abolished, and that during the time Mr. Tinsley was with the company, the prices were fixed by the Executive officers of the company.

The State of Texas further offered in evidence the deposition of **Mr. Charles S. Keith,** who testified as follows: That he was the Vice-President and General Manager of the Central Coal & Coke Company, and also General Manager of the Louisiana & Texas Lumber Company; that the Central Coal & Coke Company had an office in Kansas City; that the Louisiana & Texas Lumber Company had a sawmill at Kennard or Ratcliff, Texas, which had been in operation since about 1901 or 1902, and that the supplies for the mill were purchased from his office in Kansas City; that the Central Coal & Coke Company also owned and operated mills at Neame and at Carson, Louisiana.

Witness stated that in years 1903 or 1904, the Central Coal & Coke Company had a contract with the Waters-Pierce Oil Company for supplying it with lubricating cylinder oils, greases, etc., for these mills; that in 1905, it had a contract with the Bonner Oil Company; in 1906, with the Standard Oil Company and in 1907 that the contract was divided between the Standard Oil Company and the Bonner Oil Company, the former supplying the oils to the Texas plants and the latter to the Louisiana plants; that during no year did the Central Coal & Coke Company, and the Louisiana & Texas Lumber Company have a contract for the supplies of oil with two oil companies except during the year 1907. Witness stated that he did not know whether or not, the Waters-Pierce Oil Company furnished the supplies contracted to be furnished by the Standard Oil Company, but that their remittances for the oils contracted to be furnished by the Standard Oil Company were made direct to the latter company. Witness stated that the contracts for oils for the concerns represented by witness were always let in competition, and to the lowest bidder.

Copies of the various contracts referred to by witness are attached to his deposition (Record pages 852-870).

Mr. C. P. Ackert introduced as a witness for the State of Texas testified under cross-examination by defendant below as follows: That he was an Assistant General Manager of the Waters-Pierce Oil Company from the time of its organization until he became General Manager; that as General Manager he was in charge of the marketing of oils; that the Waters-Pierce Oil Company had about 450 stations in Texas, one or more stations in every county in the state, and about 250 tank stations—that is, stations where tanks were erected for distribution for the trade—and that the company had about 450 employees in Texas, and that 60 or 65 per cent of the total sales of refined oils made by the company in Texas were made by delivery from tank wagons or can wagons. Witness further testified that the first Executive Committee of the Waters-Pierce Oil Company was organized in June or July, 1900, and that he was a member of that Committee; that the first organization of the Committee was informal; that the organization was subsequently formally effected by resolution of the Board of Directors some time in the year 1902; that that Committee was composed of Messrs. A. M. Finlay, C. A. Pierce, C. M. Adams, J. P. Gruet, H. C. Pierce, Stephen Johnson, J. D. Johnson, and the witness, C. P. Ackert; that it was made up of the heads of the various departments, and was presided over by the President of the company; that the Committee continued in operation until 1904; that all matters of a general character were referred to and considered by that Committee; that in October or November, 1906, an Advisory Committee was organized, composed of Messrs. C. A. Pierce, A. M. Finlay, Edward Stanley, C. L. Harris and the witness, C. P. Ackert, respectively heads of departments of the company; that during the existence of the Executive Committee above mentioned, the selling price of the products dealt in by the company were fixed by this committee, and that neither the Standard Oil Company, nor anyone else had anything to do with the fixing of such prices, during that time; that after the dissolution of the Executive Committee, and until the Advisory Committee was created, prices were fixed by the officers of the company, and that during this period neither the Standard Oil Company nor any one else besides the officers of the Waters-Pierce Oil Company had anything to do with the fixing of prices; that Mr. Tinsley first went to St. Louis about March, 1904, and

that Mr. Finlay performed the duties of President from Feburary, 1904, until he left, and during his absence from about the middle of February, 1905, until June 15th, 1905, Mr. R. P. Tinsley acted as President of the company; that Mr. Tinsley left St. Louis about June 1st, 1905, and was succeeded by Mr. C. A. Pierce as President. A. M. Finley became Vice-President and these two positions have been occupied thus ever since. Witness further stated that while the Standard Oil Company fixed the prices at which it sold its products to the Waters-Pierce Oil Company, as well as to other persons, that it had no relation to the prices at which the Waters-Pierce Oil Company sold to its trade in Texas or elsewhere, but that the Waters-Pierce Oil Company fixed its own prices. Witness further testified that the Standard Oil Company, since May, 1906, had been competing with the Waters-Pierce Oil Company in portions of Illinois and of Louisiana, in which the Waters-Pierce Oil Company did business, and that the latter company had been aggressively "going after" such business.

The State of Texas introduced in evidence certain letters written by R. H. McNall to the Waters-Pierce Oil Company and its various officers, relating to the quotation of prices charged by the Standard Oil Company for goods purchased from it by the Waters-Pierce Oil Company, requests for information, reports of business done by the Waters-Pierce Oil Company, suggestions as to methods of bookkeeping and reports, etc., etc. No letter was introduced from Mr. McNall or anyone else, containing any suggestions whatsoever as to prices at which the Waters-Pierce Oil Company should sell any article in which it dealt except the one single letter of Mr. McNall's to Mr. Stephen Johnson, hereinbefore referred to, in which a price was suggested for the sale of scale wax.

The State of Texas also introduced in evidence various letters from the Standard Oil Company of Indiana, written from Chicago by Mr. Edward Bogardus and Mr. W. P. Cowan, to the Waters-Pierce Oil Company and its officers relating to the prices at which the Standard Oil Company would sell oils, gasoline and naphtha from its refineries at Neodesha, Sugar Creek and Corsicana. Not one of any of these letters contained even a suggestion as to prices that the Waters-Pierce Oil Company should sell any of its products.

The State of Texas further introduced in evidence copies of certain letters written by Mr. C. W. Cahoon, Manager of the Waters-Pierce Oil Company, from its Dallas office, to Mr. C. P. Ackert, General Manager of the Company, at St. Louis, said letters referring to various matters of detail of business, prices, discounts, rebates, etc., none of which it is believed to have any bearing on the question here under consideration.

The evidence showed that when the Waters-Pierce Oil Company wanted oil shipped from the Corsicana refinery, it was ordered through the Chicago office of the Standard Oil Company of Indiana, and that as to oil bought by the company from the Security Oil Company, at Beaumont, it dealt directly with the latter company. The record is wholly silent as to any evidence whatsoever, showing or tending to show any connection between the Security Oil Company at Beaumont, and any Standard Oil Company.

In the 11th paragraph of the court's charge (Record, p. 1148) it is practically asserted that in the light of the above evidence the fact that the Standard Oil Company owned a majority of the stock of the Waters-Pierce Oil Company was enough to establish the existence of a "combination" within the meaning of the Texas Anti-Trust Acts and the jury so found by their verdict rendered in the cause. The only facts upon which it could be contended that the jury deduced their finding that there was an agreement or understanding between the Standard Oil Company and plaintiff in error between the dates named in said charge to fix or regulate the price of oil in Texas are the fact of the ownership by the Standard Oil Company of a majority of the stock of the Waters-Pierce Oil Company and the fact that the books of the Waters-Pierce Oil Company were audited by the Standard Oil Company, and the fact that the Waters-Pierce Oil Company made reports of its business to the Standard Oil Company. We admit that these are facts which it would be proper for a jury to consider in determining whether or not there was such understanding or agreement, if there were any conflict in the evidence as to that point, but we submit that the fact of such stock ownership, such auditing and such

reports are not in and of themselves enough to prove such understanding or agreement and that there is no evidence in the record tending to show any such understanding or agreement and that no such understanding or agreement existed is shown by every witness examined by the State of Texas upon this point.

It should be borne in mind that the testimony as to this issue involved only the time **from June 1st, 1900, to March 31, 1903.** H. C. Pierce, who was tendered as a witness for the State of Texas, testified that upon the organization of plaintiff-in-error, it was agreed between him and the officers of the Standard Oil Company of New Jersey that he should control and manage the Waters-Pierce Oil Company as an independent company (Record, p. 442) **and that up to the spring of 1904** the Standard Oil Company of New Jersey made no attempt to interfere in any way with his management and control (Record, p. 442), and that there had never been any understanding or agreement between the Standard Oil Company of New Jersey or any one else and the Waters-Pierce Oil Company to fix or regulate the price of oil in Texas. (Record, pp. 500 and 507.) During the time here under consideration, the absolutely uncontradicted evidence shows that the management of the Waters-Pierce Oil Company was wholly and entirely under the control of its officers, composed in the main of H. C. Pierce, his brother-in-law, A. M. Finlay, his cousin, C. P. Ackert, his brother-in-law, Steven Johnson and his son, C. A. Pierce, (Record, pp. 497 ff, and p. 927), and each of these witnesses was tendered as a witness for the State of Texas and testified to the same facts, and that the price at which the Waters-Pierce Oil Company sold oil in Texas during the time here under consideration was determined entirely by the managing officers of said company, that is, by the persons above named and that there was no agreement or understanding with the Standard Oil Company or anyone else with reference to the matter of fixing such prices. (Record, p. 673, 691, 935, 957.)

The case of the **Commonwealth** *ex rel.* **v. Ponxsutawney**

Waterworks Co. (197 Pen. St. 569; 47 Atl. 843), raised a question, practically identical with the proposition here involved. In that case, the attorney-general brought *quo warranto* against the Water Company and sought to forfeit its charter, alleging that it had lost its existence, having conveyed its properties and franchises to the Lindsey Water Company, and because it had conveyed to and vested in the latter the control, management and supervision of its franchises, business and property. The proof to sustain this charge consisted in the fact that a majority of the stock of the defendant water company had been sold to the Lindsey Water Company, and from this it was sought to be deduced that such acts were the acts of the defendant company and the misconduct alleged, for which the defendant company should be punished. The Supreme Court of Pennsylvania, speaking through Brown J., says in answer to this proposition:

> "What a majority of the stockholders did was to sell their stock, as was their right, and through the purchaser it passed into the control of the Lindsey Water Company. But the individual stockholders, as clearly appears from the testimony, sold to an individual who purchased and paid for it with individual money and though such sales may give to the Lindsey Water Company, subsequently acquiring the stock, a controlling interest in the Ponxutawney Water Company, the latter could not have prevented the sales and, not having been a party to them, **is not accountable for them or for their effect.** The Lindsey Water Company by acquiring a majority of the capital stock of the Ponxsutawney Water Company did not acquire the property and franchises of the latter; the transfer of the majority of the stock was not a transfer of the property of the company; the transfer was of the rights of the stockholders, and the existence of the corporation was in no manner affected by it. It is being continued subject to the supervision of the Commonwealth with the right to go on in the exercise of its privileges and the performance of its duties until by some act of its own, either of omission or commission, the penalty will be forfeiture. No misconduct of the Lindsey Water Company and nothing that one or more of the majority of the stockholders of the defendant water company may have done in disposing

of their stock can be charged to it. **If it is to be punished, it must be for its own sins and not for those of another.** We have no concern on this appeal with what the Lindsey Water Company is alleged to have done. Certainly nothing has been disclosed showing that the property of the appellee has passed to it. If it has undertaken to exercise control over the same and to mortgage what it does not own, the appellee is not affected. All the rights of the latter as they came from the Commonwealth are still secure and will be protected from invasion."

In **Gates v. Hooper** (90 Texas, 563; 39 S. W. 1079), the Supreme Court of Texas laid down a definition for the term "combination" as used in the Anti-Trust Acts which has ever since been recognized in that State as authoritative and correct. In that case Mr. Justice Demman says:

"In order to constitute a trust within the meaning of the statute there must be a combination of capital, skill or acts by two or more. **'Combination,' as here used, means 'union or association.' If there be no 'union or association' by two or more of their 'capital, skill or acts,' there can be no 'combination' and hence no 'trust.'** When we consider the purposes for which the 'combination' must be formed, to come within the statute, the essential meaning of the word 'combination' and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of 'capital, skill or acts' denounced is whether the parties in the particular case **designed the united co-operation of such agencies which might have been otherwise independent and competing for the accomplishment of one or more such purposes.**"

In the **State v. Continental Tobacco Company** (177 Mo., 1; 75 S. W. 737), an information was filed by the attorney-general against the defendant company under the Anti-Combination Statute of Missouri, which prohibited any corporation, partnership or individual from creating or entering into any pool, trust, agreement, combination, etc., to regulate or fix the price of any article of manufacture or to maintain such price, etc. It was sought to punish the defendant, a foreign corporation, authorized to do business in Missouri, by revocation of its per-

mit, etc., because it had purchased the business and property of a number of other corporations, some of them situated in the State of Missouri, and it was charged specifically that, by reason of this fact the defendant corporation was guilty under the above Anti-Combination Statute. The Supreme Court of Missouri, speaking through Judge Fox, held that the purchase by one corporation of the plants, business, and good will of another, if done in good faith, in the extension, conduct and management of its business, was the legitimate exercise of a right. In discussing the term "combination" the court refers directly to the above cited case of Gates v. Hooper with approval, and practically declares that something more is necessary to prove the existence of a combination within the meaning of the statute than the mere fact that one corporation has acquired some part of the property or even all of the property of another corporation.

In this connection it must be remembered that so far as the record goes to show, the evidence is uncontradicted that the Standard Oil Company was not engaged in the business of merchandising oil in Texas, but that so far as any connection which it had with the Waters-Pierce Oil Company is concerned, it was merely and solely a refiner and producer of oil, supplying the latter company with the product which it distributed to its customers. The Standard Oil Company was essentially a manufacturer. The Waters-Pierce Oil Company was as essentially merely a dealer.

We submit that the manufacturer, wholesale dealer and retail dealer occupy the positions of three distinct classes of dealers in the commercial world and that it is a fixed and universal custom for each to confine himself to his own particular line of business and not to encroach upon the province of the other. The fact is almost universally recognized that, commercially speaking at least, it is an unpardonable offense for the manufacturer to infringe upon the business of the wholesale dealer or retail dealer or for the wholesaler to sell at retail. We submit that it cannot be made a violation of law for the manufacturer to agree not to compete with the jobber

who wholesales his products or for the wholesaler to agree not to encroach upon the territory of the retailer or compete with him, especially when he is dependent upon the wholesaler for his supplies. This custom is so generally recognized in the business world that it is looked upon as one of the very means by which monopoly in trade is prevented and by which the people are assured of the intelligent activity and experience of the retail merchant as well as of the wholesale merchant whose business makes it necessary that they keep in touch with all the markets and bring to their customers the most desiriable and cheapest goods that can be obtained. This is the very principle upon which the Anti-Trust laws are founded and if the right to contract between the manufacturer and wholesaler and the wholesaler and retailer, each mutually agreeing not to infringe upon the other's line of business is denied, the very principle of the Anti-Trust Statutes is defeated, for this would be one of the most effective methods of stifling competition.

The principle contended for here stands even upon a firmer foundation than that of mere commercial custom. It is a principle expressly recognized in the legislative enactments of the State of Texas. Subdivision 14, of Article 642, of the R. S. of Texas, declares that corporations may be organized for the transaction of any manufacturing or mining business and the purchase and sale of such goods, wares and merchandise used for such business.

Subdivision 24 of the act governs corporations engaging in the retail business; that the same may be formed for the purchase and sale of such goods, wares and merchandise and agricultural farm products.

Subdivision 25, provides for the organization of the wholesaler as a corporation; that such companies may be formed for the purpose of buying and selling goods, wares and merchandise of any description by wholesale or wholesale and retail "provided that no corporation created under this subdivision shall be chartered with a capital stock of less than $20,000.00; and provided further that such wholesale and retail business shall not be conducted apart or in separate establishments."

It is apparent from these laws that the State of Texas has fully recognized the principle above submitted, in that it has provided that no wholesaler shall surreptitiously engage in the retail business, but that if he does so engage public notice shall be given to the whole world by compelling him to maintain his retail business in the same establishment as his wholesale business. This is the only kind of corporation, for whose creation articles 642 and 643 provide, in which such limitation and restriction can be found.

Continuing the idea advanced in the above cited quotation from **Gates v. Hooper** and in the light of the proposition we have just advanced, we submit that there can be no combination in violation of the Anti-Trust Acts of the State of Texas, where competition is either impossible, (as was held in the case of **State v. Compress Co.**, 95 Texas, 603), or improbable, as must be the logical result from the statutes above noted. We contend that in applying the Anti-Trust laws of the State of Texas to any given state of facts the state must first allege and prove that the status of the parties to the alleged combination was such that they were free agents in the pursuit of their respective businesses and that they were natural competitors.

In the case of **Ft. W. & D. C. Ry. Co. v. State** (87 S. W. Rep., 236), the Supreme Court of Texas went even further and declared that in order to sustain a case under the Anti-Trust Laws of the state, it was not alone necessary to show the probability of competition but also to show the right of competition.

In this connection also, we cannot avoid raising this question: If the State of Texas, seeks to predicate the charge of combination upon the fact that the Waters-Pierce Oil Company purchased all or the bulk of its supplies from the Standard Oil Company, was it not first of all necessary that the state should allege and prove that it would have been practical and possible for the Waters-Pierce Oil Company to have procured its supplies from some other source than the Standard Oil Company? No presumption in this connection can be indulged

in to assist this radical defect and error. This is a penal case and everything that is necessary to support the conviction must be distinctly alleged and proved. No allegation of this kind appears in the petition and there was not only no proof tending to show that the Waters-Pierce Oil Company could have obtained its supplies from other sources, but on the contrary, the evidence of the witnesses offered by the state clearly shows that because of the extensive business in which the Waters-Pierce Oil Company was engaged it was practically impossible to procure oil in sufficient quantity and quality from any other source than the Standard Oil Company.

(*a.*) NOR DOES THE FACT OF SUCH OWNERSHIP OF A PORTION OF THE STOCK OF THE WATERS-PIERCE OIL COMPANY BY THE STANDARD OIL COMPANY OF NEW JERSEY WARRANT THE CONCLUSION THAT THE WATERS-PIERCE OIL COMPANY HAD BROUGHT ITS MANAGEMENT AND CONTROL UNDER THE MANAGEMENT AND CONTROL OF THE STANDARD OIL COMPANY.

At the trial of this cause, plaintiff-in-error offered an instruction to the court directly covering the above proposition, which instruction was refused. On the contrary the court charged the jury (paragraph 10 of the court's charge, Record, p. 1147), that if they found that the direction of the affairs of plaintiff-in-error and the affairs of the said Standard Oil Company, were under the same management and control on March 31, 1903, or any date subsequent thereto and prior to April 29, 1907, and that they were placed under such management or control by their respectively authorized officers under such circumstances that such common management or control caused or tended to create or carry out any restriction in the sales in Texas of such oil as is referred to in said paragraph of the charge or to fix, maintain or increase the price in Texas of such oil or to prevent or lessen in Texas the competition in the sale of such oil, the jury should return a verdict for the state. The above charge was given in face of the fact that there was

absolutely no evidence that the direction of the affairs of plaintiff-in-error and said Standard Oil Company was, after the passage of the statute of 1903, brought under the same management or control or was under the same management or control on the 31st of March, 1903, when that statute was passed or on any subsequent day thereafter. Nor was there any evidence that the Standard Oil Company had any power to bring the direction of the affairs of the two corporations under the same control or management until the majority of the shares of plaintiff-in-error were transferred on the books thereof in the name of M. M. Van Beuren some time in the year 1904. Nor was there any evidence that the Standard Oil Company ever exercised any such power either before or after said stock was so transferred. By reason of said charge, the jury found this plaintiff-in-error guilty of the offense of bringing the direction of its affairs under the same management and control as those of the Standard Oil Company, although no evidence was adduced to show that plaintiff-in-error had any part whatsoever therein and although what was done, namely the transfer of the stock as aforesaid, was not done in Texas but wholly outside of the jurisdiction thereof and without in anywise being subject to the control of this plaintiff-in-error. Much of the argument and most of the authorities cited in support of the proposition immediately preceding are equally applicable here, and it does not seem necessary to repeat them or to multiply authorities. It is certainly a new departure in jurisprudence when a court will be permitted to indulge in a presumption on a criminal trial or at least in a cause penal in its nature without any evidence to support that presumption— a presumption which in its every essential is bound to be inimical and prejudicial to the defendant in the cause. If, as a result of such wholly erroneous charge the jury finds a verdict upon which a judgment in the way of a fine is entered, it can hardly be contended that this is not a deprivation of property without due process of law,—a violation of that "law of the land," which inherently guarantees to every person the right to a fair and impartial hearing upon the merits and according to the rules

of jurisprudence, established and recognized as a fundamental in our system of law, not the least of which rules is this, that courts must confine their instructions to juries to the record and not indulge in presumptions without evidence to sustain the same.

There can be no question but that it is the right of a party to be protected against a law which violates a constitutional right, whenever by its terms or the manner of its enforcement it is manifest that a decision which denies such protection gives effect to the law, and that such a decision is reviewable in this court. (W. &. W. R. Co. v. Alsbrook, 146 U. S. 279.)

VI.

IN THE ADMISSION OF INCOMPETENT, FRIVOLOUS AND IRRELEVANT EVIDENCE, WHOLLY FOREIGN TO ANY ISSUES IN THE CAUSE, ARBITRARILY ADMITTED AND WITHOUT REGARD FOR RULES OF LAW AND THE CONSTITUTIONAL RIGHT OF PLAINTIFF-IN-ERROR TO A FAIR AND IMPARTIAL TRIAL OF THE ISSUES RAISED, SAID EVIDENCE BEING CALCULATED TO EXCITE, INFLAME AND PREJUDICE THE MINDS OF THE JURY AGAINST PLAINTIFF-IN-ERROR, THE CONSTITUTIONAL RIGHT OF PLAINTIFF-IN-ERROR TO A FAIR AND IMPARTIAL TRIAL IS DENIED, AND BY THE JUDGMENT UPON THE VERDICT IN SAID CAUSE PLAINTIFF-IN-ERROR IS DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Against the objection of plaintiff-in-error, the court admitted evidence of the Standard Oil Trust agreement of 1882, in the petition of the State of Texas set forth, which said agreement was made many years before the incorporation of plaintiff-in-error and to which it was admitted plaintiff-in-error never became a party. (Record, p. 398 and 7 ff.) Over objection the court further admitted in evidence the 3rd, 4th, 5th, 6th, 7th,

and 8th paragraphs of the agreement of counsel called Stipulation No. 1 (Record, pages, 424, 425, 426), setting out that the Standard Oil Company of New Jersey owned a majority of the shares of the companies therein mentioned, to-wit: the Standard Oil Company of Indiana, Standard Oil Company of New York, Standard Oil Company of Kentucky, and Continental Oil Company and the Republic Oil Company, although each and every one of such companies therein mentioned did not transact any business in the State of Texas and were in no wise competitors with this plaintiff-in-error, and said evidence was in no way connected with or had any relation to any of the questions involved in the cause. The court also, over objection of plaintiff-in-error, admitted in evidence that plaintiff-in-error had given rebates and discounts to certain dealers (Record, p. 719), and had sold oils at different prices in different localities in Texas, all of which evidence was wholly irrelevant to any issues in the cause and could have no other effect than to inflame and prejudice the minds of the jury against this plaintiff-in-error. The court, also over objection, admitted in evidence the testimony of the witness, C. W. Cahoon, (Record, p. 781) to the effect that at certain points in Texas where there was competition, the defendant sometimes sold oils at less than at points where there was no competition, which said testimony was wholly immaterial to anything at issue in said cause, had no tendency whatever in showing any violation of any of the laws of Texas and could have no other effect than to prejudice the jury. The court, further, and in like manner over objection, admitted in evidence the testimony of said Cahoon to the effect that for about sixty days in the year, 1906, certain brands of oil of grades inferior to that known as "Eupion Oil" had been sold by plaintiff-in-error as "Eupion Oil," (Record, pp. 799, 800) which said evidence was wholly frivolous as well as irrelevant and calculated to excite, inflame and prejudice the minds of the jury against plaintiff-in-error. The court in like manner, over objection, further admitted in evidence the testimony of witness A. W. Clem (Record, p. 740) to the effect that the old Waters-Pierce Company in 1891, (nine years before this plaintiff-in-error was organized and incorporated) cut the prices

of oil at Seymour and other places in Texas, and also that the old Waters-Pierce Company in 1894, (six years prior to the organization of this plaintiff-in-error) after it bought out the business of the same witness, advanced the selling price of oil from 9½ cents to 22 cents per gallon (Record, p. 744), all of which testimony did not relate in any way to this plaintiff-in-error or its doings, and was wholly irrelevant and immaterial to any issue involved in the cause, and the effect whereof was clearly to inflame and prejudice the minds of the jury against said plaintiff-in-error.

The court, in like manner, over objection, admitted in evidence the testimony of the witness Royer Campbell (Record, p. 694) to the effect that in 1894, (six years prior to the incorporation of this plaintiff-in-error) when he quit buying from the old Waters-Pierce Company and bought from other persons in San Antonio, the old Waters-Pierce Company immediately cut the price of oil from 16 cents or 17 cents to 8 cents and 10 cents per gallon (Record, p. 697), and also his testimony as to the character and nature of the warfare and competition which the old Waters-Pierce Company carried on with him in 1894, (Record, p. 697, 698) all of which evidence did not relate in any way to this defendant, or to any of its acts and was wholly irrelevant and immaterial to any question in issue and solely calculated to prejudice and inflame the minds of the jury against said plaintiff-in-error.

Over objection, said court also admitted evidence of the incorporation of the Standard Oil Company of Ohio (Record, p. 396), and of the Standard Oil Company of New Jersey (Record, p. 1011), and of the incorporation of the old Waters-Pierce Company (Record, p. 1004), which said corporation was dissolved and went out of existence in 1900, as evidenced by the certificate of the Secretary of the State of Missouri, in the record shown (Record, p. 439), all of which evidence was wholly immaterial to any question at issue, and could have no effect but to divert the minds of the jury from the issues involved and to prejudice them against plaintiff-in-error.

We can conceive of no theory of this cause which would justify the admission in evidence of the testimony above

mentioned, the highly prejudicial character and tendency of which is plainly apparent. It would seem to be fully as competent to show that a man on trial for murder had been guilty of other distinct offenses, such as swindling, robbery and rape, as to show on the trial of this cause wherein plaintiff-in-error was charged with being a party to agreements and understandings in violation of the Anti-Trust Laws of the State of Texas, that it had deceived and misled its customers and imposed on them by selling them an inferior grade of oil under the name of a superior grade. Knowing full well how extremely unpopular the Standard Oil Company or any corporation of that name was in the State of Texas, it was not only highly improper but it was absolutely prejudicial to the constitutional rights of plaintiff-in-error, to permit any testimony to be given concerning said Standard Oil Company and its acts, with nothing to show that plaintiff-in-error was in any wise connected therewith.

It will doubtless be argued that on a question of the admission or rejection of evidence the trial court and the appellate courts of the state must be deemed to be final judges, and we admit that within certain limitations this is true. But we contend that there are certain fundamental principles and rules governing the admission of evidence, especially in criminal causes or in causes of a penal nature, which are so firmly embedded in our jurisprudence, which are so plainly necessary for the protection of life, liberty and property,which have grown up in response to inherent feelings of right and justice, that they have become as much a part of the "law of the land" as that rule which says that no man shall be condemned without first being heard in his own defense. Of what good is the right of defense in a court of justice as against charges presented, if the trial of the cause is to be made a travesty by submitting to the jury evidence of everything under the sun excepting that which is material to the issue? Surely, it will not be urged that this is that "due process of law" which safeguards the person, which safeguards the citizen, be he person or be it a corporation, from unjust and arbitrary judicial proceedings. It cannot be contended that the limitations of the

Federal Constitution in this respect upon the power of the states apply solely to acts of the legislature. It has been held time and again in both the Federal and State courts that the protection extended by the Fourteenth Amendment against the arbitrary exercise of power by the states includes not only legislative acts but those of the executive and judicial departments as well. And it is upon this that we insist that a constitutional right has been violated. We contend not merely that error has been committed, by the admission of immaterial, prejudicial evidence, but that, in such admission the due process of law guaranteed to this plaintiff-in-error and to every citizen of the Republic has been arbitrarily and capriciously denied.

Says Prof. Robinson, in his work on American Jurisprudence, page 238, in speaking of the history of American constitutions:

> "Thus our constitutions, however recent their appearance as written laws, are not the figments of a day, the venturesome experiment of political empiricism, but the natural, inevitable outgrowth of ancient and well comprehended principles, whose truth has been tried and tested by ages of practical experience and demonstrated by the freedom, enlightenment and happiness of the people among whom they have prevailed."

And in discussing the limitations upon the legislative power of the states, he uses the following language, page 257:

> "But in a state whose written constitution is a limitation of pre-existing powers under which all unasserted governmental powers retain their former comprehensiveness and vigor, the acts of legislative bodies may be invalid, although they are not mentioned or referred to in the constitution. Prior to the adoption of the written constitution, the legislative power was not without its limits, established by the nature of the state and those fundamental principles of the social compact which underlie all governmental action, irrespective of constitutional provisions. **These unwritten and irremovable limitations are not destroyed,** though many of them may be expressed therein **and legislative enactments which exceed them are no less invalid than if they violated the words as well as the spirit of the constitution.** The constitutions of our

individual states being such limitations of pre-existing powers, therefore, do not present the sole test of the invalidity of statutes promulgated by their several legislatures, but, in addition to their written constitutions, **there is still in force the unwritten higher law to whose necessary and unchanging principles the enactment of the legislative body must also conform."**

And on page 259, he says:

"A legislature cannot enact a law which palpably infringes any of these rights to assert and defend which the state has been established. The sovereignty of the state-although unlimited in measure or degree, exists only for specific purposes which together constitute the welfare and advancement of the people of the state, and any action of its governmental agency which is subversive of these purposes is necessarily beyond their powers. **What the state itself could not do without a violation of its highest obligations to its citizens, no institution of the state can lawfully perform.** Whenever, therefore, a statute enacted by the legislature is so absurd, unjust or impracticable as to defeat the objects for which the government was organized, the statute is invalid."

This phrase, "due process of law," was carefully discussed under circumstances not essentially different from this cause in the well-considered case, **in re Ziebold** (23 Fed. Rep., 791). In that cause a writ of *habeas corpus* was asked of the United States Circuit Court upon the grounds that petitioner was unlawfully deprived of his liberty under an act of the State of Kansas giving power to the county attorney to summons persons and compel them to testify before him in proceedings under the law of Kansas prohibiting the manufacture and sale of intoxicating liquor. The question was squarely presented whether a person imprisoned for refusing to appear or testify in proceedings of such character was restrained of his liberty without due process of law within the meaning of the Constitution of the United States. Says the Circuit Court of the United States, speaking through Foster, J.:

"The first matter of inquiry is the meaning of the term due process of law.' If it has no broader meaning than the purposes prescribed by act of the legislature, it is the

end of the cause. But such a construction would render the constitutional guarantee mere nonsense; it would then mean, no state shall deprive a person of life, liberty or property unless the state shall choose to do so. It has repeatedly and uniformly been adjudicated that the terms 'due process of law' and 'law of the land' have a broad and comprehensive meaning, and originated in that very bill of right, Magna Charta, and operate as restriction **upon each branch of government."** (Citing Murray's Lessee v. Hoboken Land Co., 18 Howard, 272; Davidson v. New Orleans, 96 U. S. 107; *ex parte* Virginia, 100 U. S. 346.) * * * * * * * * * * * * The words 'due process of law' must be directed at something deeper than mere forms and rules by which courts administer law; they were evidently intended to guarantee and protect some real and substantial right to life, liberty and property as the ultimate result **and probably to prohibit any arbitrary and oppressive proceedings by which the individual is deprived of either."**

And in discharging the prisoner, the court concludes by saying:

"I believe no precedent can be found for the application and use of judicial power in the manner and for the purpose contemplated by this act, **and that it is a dangerous innovation on the fixed maxims and rules in the administration of justice, established for the protection of private rights."**

In *ex parte* **Virginia** (100 U. S. 346), the Supreme Court of the United States, in discussing the meaning of the term, "due process of law," says:

"They have reference to the actions of a political body denominated a state by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provisions therefore must mean that **no agency of a state** or of the officers or agents by whom its powers are executed shall deny to any person within the jurisdiction the equal protection of the laws; whoever by virtue of a public position under a state government deprives another of property, life or liberty without due process of law, violates * * * * * * * the constitutional inhibition, and as he acts in the name of and

for the state and is clothed with the state's power, his act is that of the state. This must be so or the constitutional provision has no meaning."

Mr. Justice Johnson, speaking for the Supreme Court of the United States, in **Bank of Columbia v. Okley,** (4 Wheaton, 235), says:

"As to the words from **Magna Charta,** incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice."

In **U. S. v. Cruikshank,** 92 U. S. 554, and in **Hurtado v. California,** 110 U. S. 527, the foregoing language is expressly approved.

Judge Cooley, in his Constitutional Limitations (7th ed., p. 506) says:

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

In **Utah v. Bates** (14 Utah, 293; 47 Pac. 78; 43 L. R. A. 33), the question was presented to the Supreme Court of Utah whether a trial for felony by eight jurors did not violate "due process of law" guaranteed by the state constitution or the same guarantee as included in the Fourteenth Amendment to the United States Constitution. Zane, Chief Justice, in holding the statute which provided for a trial by eight jurors constitutional, and not within the prohibition of the Federal Constitution, says:

" 'Due process of law' is a general expression and is equivalent to 'law of the land.' It permits the deprivation of life, liberty or property according to law, not otherwise. Is shields such rights from arbitrary power. 'Due

process of law' in a case like this requires a law describing the offense. The offense must be described in an accusation; the accused must be given his day in court; his trial must proceed according to an established procedure consisting of rules of pleading and practice. **The admission of evidence for and against him must be according to established rules** and he must be convicted by the judgment of a competent court and the punishment authorized by law. The definition of the offense and the authority for every step in the trial must be found in the law of the land. **Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law."**

If the law laid down by the learned court, above quoted, is correct; if the definition and interpretation of due process of law as therein given meets the approval of this court, and is—as we believe it is—correctly expressive of every security of right and justice guaranteed by the Federal Constitution, an examination of the record in this cause and especially of the evidence admitted herein upon which plaintiff-in-error was convicted, cannot fail to convince this court that in the trial of this cause plaintiff-in-error was not given the protection of the law of the land, as designed by the Federal Constitution.

In **San Jose Ranch Company v. San Jose Land and Water Company,** (126 Calif. 322; 58 Pac. 824), the question was squarely presented to the Supreme Court of California whether it was violation of "due process of law" to deprive defendant of rights under well known principles of pleading and practice, and especially with respect to the admission and rejection of evidence. In that case the discussion narrowed itself down to the meaning of a section of the Code of Civil Procedure of California which provided that no judgment, decision or decree of a lower court shall be reversed because of error, ruling, instruction or defect unless it appear from the record that the same were prejudicial to defendant or plaintiff below, and that a different result would probably have been reached if such error, ruling, instruction or defect had not occurred or existed.

The Court, speaking through Temple, J., says:

"Ordinarily we cannot ascertain or determine from the record whether the appellant has suffered substantial injury or whether a different penal result would have been reached had not some particular error been committed. If the court should erroneously refuse to receive any evidence for a party and should arbitrarily determine all issues against him, this court could not determine from the record whether he would have fared better if the evidence had been admitted. So, if in an ordinary action of law a court were to erroneously deny a jury trial, the record could not disclose that a different result would have been probable if the error had not been committed, **although it would plainly enough show that a party had been denied a trial according to the law of the land.** A person against whom such a ruling has been made and who has lost his case has been deprived of life, liberty or property, without 'due process of law.' And this amendment, if valid, would prevent a reversal of the cause upon that ground. That it might result in preventing the appellate courts from enforcing the fundamental right to a jury trial is not really of greater moment, **perhaps not so much,** as the fact that it may prevent this court from enforcing uniformity in the administration of the law. Under this rule any and all trial courts may refuse to be governed by the law of procedure and evidence solemnly enacted by the legislature; and unless we can determine from the record both that the party complaining has suffered substantial injury and that a different result would have been probable if the law of procedure had been followed there could be no reversal. It is the right of every person, before he can be deprived of his property, to have a trial according to law—**to have the same character of trial, governed by the same established rules of evidence and procedure as are applied in other cases under similar conditions.** 'Due process of law' is law in its regular administration through courts of justice. (Citing 2 Kent Com. 10.)"

In **Pennoyer v. Neff** (95 U. S. 714; 24 L. ed. 565), Mr. Justice Field says of the words "due process of law" when applied to judicial proceedings:

"They then mean a course of legal proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

It can hardly be denied in the face of these authorities that uniformity in the administration of justice is a **fundamental right,** and every litigant may demand that his case shall be tried so far as practicable by the same fundamental and established rules of procedure and evidence as well as upon the same principles which are applied in other like controversies. This is due process of law—the law of the land. And the conclusion is inevitable that a denial of this right, either through legislative, executive or judicial authorities of a state, is a denial of a fundamental and inherent right, guaranteed to the citizen by the Federal Constitution. Surely, if that right so guaranteed is denied by the court of a state to which the litigant naturally looks for an assertion of that right, nothing else is left to him than to appeal to the Federal Courts for the protection which the Federal Constitution guarantees to him.

VII.

THE FINE IMPOSED IS SO GROSSLY EXCESSIVE AS TO DEPRIVE PLAINTIFF-IN-ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

In this cause the verdict of the jury assessed penalties under the Act of 1899, against plaintiff-in-error in the sum of $1,549,500.00 for alleged violations of law for each of the days between May 31, 1900, and March 31, 1903, a total of 1033 days, and at the rate of $1,500.00 per day; and under the Act of 1903, in the sum of $74,400, for alleged violations of said law for each of the days between April, 1903, and April 29, 1907, a total of 1,488 days, and at the rate of $50 per day; making a total of penalties assessed for said alleged violations of law, of $1,623,900, taking into no consideration the Sundays within said periods and other days in which plaintiff-in-error did not or could not have operated its business within the State of Texas.

We do not contend that this excessive fine is within the prohibition of the Federal Constitution against levying excessive

fines, but we do contend that whenever a fine is so grossly excessive as to be wholly out of proportion to the offense committed, to be essentially destructive of the property of defendant, it is in violation of such well known and fundamental principles of law as to constitute a violation of the law of the land and deprive defendant of its property without due process of law.

If punishment is inflicted for the purpose of suppressing crime and reforming the offender, we submit that the amount of the penalty in this cause is so large as to destroy plaintiff-in-error in the State of Texas, thus violating the declared purpose of all criminal law, of affording the offender an opportunity to reform and correct its conduct or methods of business. In short, the punishment as imposed, while answering the first definition of the object of all punishment, namely, to suppress crime, instead of carrying out the second equally fundamental purpose, namely, that of reforming the offender, has instead, the effect of destroying the offender. The 20th Paragraph of Magna Charta clearly indicates the purpose of punishment and the extent to which fines may be imposed, and it will not be contended that the principle therein enunciated has ceased to exist in our American law. Under that principle, it was the established policy of the English law not to impose a fine upon an offender to the extent of depriving him of all his goods, but to leave to him the opportunity to reform and to evade his destruction. As bearing upon the question under discussion, we quote the following extract from Cooley on Const. Limitations (7th ed., 471.)

> "It is also a constitutional requirement that excessive bail shall not be required nor cruel and unusual punishment inflicted."
>
> "**Within such bounds as may be prescribed by law** the question what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised and there may be cases in which a punishment, though not beyond any limit fixed by statute is nevertheless so clearly excessive as to be erroneous in law. A fine should have some reference to the party's ability to pay it. By Magna Charta, a freeman

> was not to be amerced for a small fault, but according to the degree of the fault; and for a great crime in proportion to the heinousness of it, **saving to him his contentment;** and after the same manner a merchant, **saving to him his merchandise.** And a villein was to be amerced after the same manner, **saving to him his wainage.** The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions."

Now while it may be answered that a foreign corporation which violates the law of the state and thereby forfeits its right to do further business in the state does not technically fall within the rule here announced, we submit that since corporations, foreign as well as domestic, are guaranteed the equal protection of the law, we must look behind the technicality of the creation of the corporation as such to the rights of the individuals who, in final analysis, are the real owners of its property.

In this case we have plaintiff-in-error as the first defendant convicted of a violation of a new and untried law, (the Act of 1903 and, so far as pecuniary penalties are concerned, of the Act of 1899, also). Since it was shown that there were other concerns in the State of Texas competing with plaintiff-in-error as a dealer in oils, if the methods of doing business and the prices charged by plaintiff-in-error for its products were oppressive upon the people of Texas, certainly we should expect to find abundant evidence in the record of its culpable wrong doings. And in such case, we should expect that complaints would have been made and prosecutions instituted long before the institution of this suit.

The history of the past few years is replete with discussions in newspapers, magazines and otherwise, of combines, trusts, pools and monopolies, words which have too often been distorted from their real and true meanings, and have become almost synonymous with all that is evil. While it may be true that there is no such thing as a "good trust," it is certainly not in accord with the spirit of a great, free and enlightened government to sanction the confiscation of private property

through the accumulation of penalties against a defendant whose only sin arises from the fact that another corporation held a majority of its stock and furnished it with its manufactured product; and this in view of the further fact that, while this other corporation did so hold a majority of the stock of plaintiff-in-error, it permitted a minority stockholder to keep his own relatives and friends as managing officers and from among them to constitute a majority of its board of directors and at the same time furnished its oil to plaintiff-in-error at a price at which it could and did compete on equal terms with other persons engaged in the same line of business.

There is nothing in the record to show any material, substantial or culpable wrong-doing toward the people of the State of Texas on the part of plaintiff-in-error; nothing to show any "heinousness of the offense" and it is nothing short of confiscation for the State of Texas at this late day to enforce the Anti-Trust Act of 1899 against a foreign corporation except to the extent of forfeiting its permit to do business in the State—to wait seven years and until long after the Act had been repealed and the amount of the penalty for such offenses actually and greatly reduced and then to insist upon a verdict against this plaintiff-in-error for $1,500.00 per day for 1,033 days.

We contend that the action of the court, as one of the departments of the State government, in sanctioning the act of the prosecuting officers of the State of Texas in delaying this prosecution against plaintiff-in-error for nearly seven years and permitting the State to enforce penalties for each day's violation of the laws, including days in which plaintiff-in-error admittedly was and could not have been doing business, is a denial to this plaintiff-in error of the protection guaranteed it under the Fourteenth Amendment to the United States Constitution.

Without wishing to be tedious, we nevertheless feel in duty bound to discuss fully the contention here advanced, a contention which at first glance may seem novel, if not, indeed, without merit.

Further on in this argument we shall discuss fully the proposition that the several Anti-Trust Acts of the State of Texas are so vague, indefinite and ambiguous as to fail to define any

offense with such certainty as to inform the public in advance of the constituents of the offense. Without wishing to anticipate the argument on that point, we desire to emphasize the proposition that these Anti-Trust Statutes of the State of Texas have never been the subject of judicial consideration upon the point here directly involved—whether a foreign corporation can be subject to penalties because of the holding of its stock by any person or corporation engaged even in a similar line of business, when it is not distinctly and conclusively shown that such holding of stock was in violation of the law of the State where the corporation was created. In this connection it should not be forgotten that the State of Texas has never heretofore attempted to subject a foreign corporation to penalties for violating its Anti-Trust Laws, but has in each and every case confined its efforts to the cancellation of the permit of such corporation, following it usually by an injunction preventing such corporation from further doing business in the State.

If the law under which plaintiff-in-error is being prosecuted had been the subject of judicial construction and interpretation, and its meaning clearly declared, or if the law itself clearly and with certainty defined the acts which constitute an offense a different question would be presented.

It cannot be contended that the Act of 1899 is a statute which clearly defines an offense, and that its meaning is clear of all doubt and that it clearly and unquestionably embraces the particular transactions through and by means of which plaintiff-in-error was organized as a corporation under the laws of the State of Missouri, or its subsequent transactions and relations with the Standard Oil Company of New Jersey. The fact that this statute did not clearly and satisfactorily express the legislative will is best shown by its repeal by the Act of March 31, 1903, and it is a fair contention that the legislature, it it did not doubt the constitutionality of the Act of 1899 because it was so indefinitely framed and of such doubtful construction that it did not sufficiently and clearly define an offense, did believe that the enormous fines and penalties which could be inflicted under its provisions would bring it in conflict with the constitu-

tion of the State; otherwise there is no explanation why the penalties were reduced from a maximum of $5,000.00 per day to a fixed fine of $50.00 per day, for the same offense under both statutes.

In addition to the authorities cited in support of the proposition next immediately following, we make special reference to the reasoning of Mr. Justice Brewer in discussing the right to enforce an uncertain law in the case of **Cutting v. Goddard,** (183 U. S. **loc. cit.** 101). After stating a number of supposable cases, the learned Justice says:

> "It may be said that these illustrations are not pertinent because they are of civil actions, whereas this statute makes certain conduct by the stock yards company a criminal offense and simply imposes punishment for such offense; that it is within the competency of the legislature to prescribe the penalties for all offenses, either those existing at common law or those created by statute; and, further, that although the penalties herein imposed may be large, yet obedience to a statute like this can only be secured by large penalties; for otherwise the company, being wealthy and powerful, might defiantly disregard its mandates, trusting to the manifold chances of litigation to prevent any serious loss from disobedience. A penalty of a dollar on a large corporation whose assets amount to millions would not be very deterrent from disobedience. It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all individuals or corporations; and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of a statute, the question would be very different from that here presented. But when the legislature in an effort to prevent any inquiry of the validity of a particular statute so burdens any challenge thereof in the courts that the party affected is necessarily constrained to submit rather than take the chances of the penalty imposed then it becomes a serious question whether the party is not deprived of the equal protection of the law."

It is true that in this case the final decision was not made to depend upon the proposition, broadly announced, that a criminal statute of doubtful meaning cannot be enforced at all until

after the court shall have construed it and declared its meaning. But the application of the principle in this case clearly presents the question whether the State can delay acting for a long period of time, bring suits against other corporations and expressly therein avoid setting up any claim to recover penalties, and then finally select a particular corporation to inflict upon it cumulative penalties for seven years in the first and only case in which the full meaning of the statute is attempted to be declared and enforced.

As we have already pointed out, the record wholly fails to disclose any evidence that in the formation of the present Waters-Pierce Oil Company there was any understanding or agreement as to the fixing of prices in the sale of oil in Texas, but on the contrary, the uncontradicted evidence upon this point showed that it was understood between Mr. H. C. Pierce and the representatives of the Standard Oil Company that Mr. Pierce, even though the minority stockholder, should be permitted to manage and control the new company without dictation or interference on the part of the Standard Oil Company and that under this agreement Mr. Pierce was actually permitted and did in fact name the board of directors, and at all times had on said board a majority (usually his own relatives) more directly friendly to his interests than to the interests of the Standard Oil Company, and that this same policy was maintained in the selection of managers of the different departments of the business and in the appointment of the company's agents. These facts stand uncontradicted and undisputed.

The facts disclosed by the record show that when the old Waters-Pierce Company was excluded from the State of Texas because of the misconduct of a few of its local agents, the stockholders of said company were confronted with the question as to what was to be done with the valuable property, and especially the valuable business which had been created in the State of Texas by many years of careful management and the investment of large capital. But one course was open in order to conserve this property and maintain its value—to organize a new corporation under practically the same management as

that which had made the old company so valuable to its stockholders. The record shows that the Standard Oil Company was chiefly engaged in the business of refining oils, was essentially a manufacturing corporation, and also held the stock of different companies through which its business as a manufacturer was conducted, and also held some stock in certain marketing companies.

It is admitted that the Standard Oil Company under its organization and charter could not have obtained a permit to do business in the State of Texas for more than one purpose. Let us suppose that this company had applied for a permit to transact business in Texas and had only the single purpose of engaging in business as a merchant or dealer in oils in the State. Had it done so, the question would present itself: Would not its own charter have conclusively shown that it could not lawfully do business in the State of Texas and would not this fact have justified, if it did not actually require the Secretary of State to refuse the permit? Had it organized another company and excluded Mr. Pierce, would not this have been attempting to do **indirectly** what it could not do directly?

Instead of pursuing either of these courses, the Standard Oil Company was contented to let Mr. Pierce organize a new company, to take over the property and business of the former company with the distinct understanding that he should be permitted to dictate its policy and control its business, just as he had managed the property and business of the old company, and while the evidence shows that for a short time there was a disposition on the part of the Standard Oil Company to violate this agreement, it also shows that such effort was soon abandoned.

There is absolutely nothing in the record to show that there was ever any agreement between Mr. Pierce and the Standard Oil Company that the new company should buy all of its supplies from the Standard Oil Company, and at this point, we desire to call special attention again to the fact that the evidence does not show that it would have been possible for Mr. Pierce and those under him, as managers of plaintiff-in-error, to have secured their supplies from any other source than that

from which they did actually procure them, namely, from the Standard Oil Company. The Waters-Pierce Oil Company made its wholesale purchases of oil for use in its business from the Standard Oil Company, not because of any agreement or understanding with that company, but because it was good business policy, and nothing more. We, therefore, have a state of facts in which there was no agreement and no understanding to regulate or to fix the price of oils in Texas or to maintain the price when so regulated or fixed, and no agreement to fix or limit the amount or quantity of such oils sold and, therefore, nothing to which Section 1 of the Anti-Trust Law of 1899 could apply.

Does Section 2 of the Act of 1899 apply to the facts as presented in this cause? We here must confess our inability fully to understand just what is meant and intended to be included within Section 2 of the Anti-Trust Act of 1899. If we exclude all unnecessary words, the section referred to may be conveniently divided into four subdivisions and rewritten to read as follows:

"1. A monopoly is any union, combination, consolidadation or affiliation of capital, assets, property, etc., between persons, firms or corporations to regulate, fix or maintain the price of any article of merchandise, etc., or by which it is sought to promote, accomplish, execute or carry out the fixing, regulating or maintaining of prices or whereby such result is reasonably calculated to be produced.

2. A monopoly further includes the aggregation, amalgamation, affiliation, consolidation or incorporation of the capital, assets, property, etc., of one or more firms or corporations.

3. A monopoly may further be created by the purchase, acquisition or control of shares or certificates of stocks or bonds or other corporate property or franchises whether this results from a union or combination between two or more persons, firms or corporations or by the act of a single individual.

4. All corporations or partnerships that have heretofore been or may hereafter be created by the consolidation or amalgamation of the separate capital, assets, proper-

ties, etc. of two or more firms or corporations are hereby declared to be a monopoly."

From the first subdivision which we have made of this section of the act it will be seen that its terms are in every way sufficient to denounce even the ordinary partnership, to prohibit the formation of new partnerships and to require the dissolution of all existing partnerships, for, certainly, two individuals who combine their capital and form an ordinary partnership thereby actually exclude themselves from competition with each other and to the extent of their ability, by combining in this manner, do an act that is reasonably calculated to affect, fix, regulate or maintain prices.

The regulation or fixing of prices is reasonably calculated to be effected under the second subdivision as above rewritten by the creation of any ordinary corporation in any line of business whatsoever, and certainly in such business where the incorporators might otherwise become competitors or where an existing co-partnership is incorporated.

By the third subdivision, the control of two or more corporations by a single individual is prohibited, and, if the reading we here give is correct, we must confess ourselves at a loss to understand what this provision means. It will be seen that this follows the attempt to define a monopoly as the result of the combination between two or more persons or corporations. As an amalgamation or consolidation of the affairs of any two or more corporations may be brought under a single management by a single individual, it would seem that this law intends to prohibit the individual from acquiring a sufficient amount of shares of stock, bonds or other corporate property in order to give him control—in other words, the individual is hereby prohibited from buying as much as his money or credit will enable him to buy.

As to just what is meant by acquiring the "bonds" of a corporation in order to give the purchaser a control of it, and as to how the corporation may be controlled by acquiring its property or franchises, we also confess ourselves unable to comprehend. If the property of a corporation is sold the

corporation thereby loses its dominion over it, and certainly it will not be contended that the ordinary trading corporation has any franchise at all except the primary franchise to exist. And this primary franchise cannot properly be subject to sale.

By the fourth subdivision, it would seem clear that if two or more firms or corporations had heretofore been consolidated into a single firm or corporation, and that even by authority of law existing at the time of such consolidation, this existing status, originally proper and lawful, is under the terms of the Act declared a monopoly, and its creation an offense against the Act. A better example of an *ex post facto* law could hardly be found, if our interpretation of this section is correct.

In attempting to analyze Section 2 of the Anti-Trust Act of 1899, we have endeavored fairly to re-state it in comprehensible terms, so far as we are able to understand its provisions; if our analysis is correct, it seems clear that this section embraces practically every act by which any two persons unite their capital, skill or acts in a common enterprise; that the Act denounces the incorporation of an existing firm, a right clearly recognized in law, and forbids a single individual to acquire the stock or property of any competing corporation, no matter what his purpose may be in so purchasing such stock or property.

It may be said that the Legislature did not intend to denounce ordinary business relations arising between men, and that only acts injurious to the public are included in the terms of this section. If such be the contention, we answer that these things are so intermingled with the other provisions in the Act that it is impossible to separate the good from the evil, and that Section 2, when considered together, fails to define any offense with such sufficient certainty that it can be enforced as a penal statute. Certainly the situation which is presented by the record in this case falls more clearly without the express terms of this section than does the act of forming or continuing a partnership when the members might otherwise be competitors with each other. For, as the record shows, we have here the Standard Oil Company, a producing corporation, a foreign corporation admittedly without any

legal right to do business in the State of Texas, holding stock in the Waters-Pierce Oil Company, a mere distributing corporation not engaged in the same line of business in Texas, and lawfully admitted under a valid permit.

In this connection, we desire to call particular attention to the case of **Gates v. Hooper,** (90 Texas, 563; 39 S. W. 1079), in which the Supreme Court of Texas distinctly recognizes the feature of the good will of a business as being the proper subject of contract, and upheld the right of a purchaser of the good-will to exclude the seller under the terms of the contract from entering into competition with him.

There is a strong and striking analogy between that case and the facts which are presented in this, in that the good-will which was an incident to the established business of the old Waters-Pierce Company in Texas was its most valuable asset. That good-will was an indivisible thing, and as the old company was required to give up its business in the state, under the above decision there can be no doubt that it could have sold this good-will and excluded itself under the contract from any future competition with the purchaser thereof. If the company had then been dissolved—as it was—this good-will as an asset of the business, after the claims of creditors had been satisfied, remained as the property of the stockholders, to-wit: of Mr. Pierce and the Standard Oil Company, as tenants in common of a property to which that good-will was an incident. And under the authority of Gates v. Hooper, we submit this proposition: Could not these individual owners of the assets of the defunct Waters-Pierce Company have sold the business in Texas with the good-will attaching thereto, and under a valid contract excluded themselves from entering into any future competition with the purchaser? Since the good-will was an indivisible asset, the conclusion would seem necessarily to follow that the owners thereof had a right to make a similar agreement with respect to the new company, and for the additional reason that one of these owners, strictly speaking, had not the right to enter the State of Texas as a competitor, unless it can be held that it is competent for a state to make it an offense because a foreign corporation will not so adjust its

affairs as to qualify it for admission and, after doing this, apply for a permit to do business in the State. It would seem wholly unnecessary to state the proposition that every foreign corporation has a constitutional right to remain out of the State of Texas.

In support of our contention that, in this final analysis, the stockholders of the old Waters-Pierce Company were the owners of its property and had the right to take all necessary steps to maintain and secure its full value to them, we must conclude that the law would be the same with respect to this corporation as it would be of a corporation whose stock was held entirely by separate individuals. This suggestion does not require that we shall claim for the Standard Oil Company, as a foreign corporation, the same right as an individual stockholder—that is, to become the purchaser of the property and continue the business in the State of Texas—but we do contend that the Standard Oil Company had every right of an individual stockholder except one—this right of purchase and continuation of the business of the old Waters-Pierce Company in the state. This, therefore, included the right to join in the dissolution of the old company for the purpose of protecting its property in the State of Texas and the consequent right to make agreements and contracts with respect to the sale of that property, the same as any other stockholder, in order to realize the most therefrom or best preserve its value.

It certainly cannot be contended that the judgment of ouster entered against the old Waters-Pierce Company is to be construed as one of outlawry against the individual stockholders of that company, and a destruction, if not confiscation, of their property.

This claim will not stand analysis upon any other principle than that it is competent for a state to outlaw the stockholders of a corporation, and confiscate their property when it has been found that the corporation has misused its franchise or violated the law of the state. We find nothing in the laws of the State of Texas to sanction such a principle. And we submit that the judgment of ouster entered against the old Waters-Pierce Company in 1900, could have no greater effect than to cancel

the permit of that corporation and enjoin it from further doing business in the State of Texas. The individual rights of the stockholders in the concern were not before the court. And since there was nothing in the law which denied to these stockholders their full and complete rights of ownership, which included the right to dissolve the old Waters-Pierce Company as an existing corporation under the laws of the State of Missouri under which it had been originally incorporated, and thereafter to deal with the property as could any other owner or owners of similar property, we must limit the judgment to this, its proper legal effect. That we are not mistaken in our construction of the rights of stockholders of a dissolved corporation might be shown by a multitude of authorities. We content ourselves with reference to only a few, and these in the State of Texas.

In **Olsen v. Homestead Land Co.** (87 Texas, 371), the Court says:

> "The right which a shareholder in a corporation has by reason of the ownership of shares is a right to participate according to the amount of his stock in the surplus of the profits of the corporation on a division, and, ultimately on its dissolution, in the assets remaining after the payment of its debts."

In **Arkansas Harbor Company v. Manning** (94 Texas, 563), the court says:

> "A stockholder merely as such has no direct agency in the control of the business of a corporation. He has no direct interest in the property; his right to such property is collateral. But in its last analysis, the stockholders are the beneficial owners of the assets of the corporation."

And in **Baldwin v. Johnson** (95 Tex., 85), the court says:

> "The pleading and evidence show that the John Henry Shoe Company had been dissolved under the laws of the State in which it was created, and being so dissolved in that State, it was defunct as to every other State; for the State which gave it life had the power to prescribe the manner and means of its dissolution. No debts existed against the corporation and the commissioners appointed

> under the laws of Louisiana were merely for the purpose of collecting the assets and distributing them among the stockholders, **but the property itself upon the dissolution of the corporation became the property of the stockholders, each one of whom owned an undivided interest in it in the proportion that his stock bore to the whole capital stock."**

From the foregoing it will be seen that the courts of the State of Texas clearly recognize the principles for which we contend, and, assuming the right of dissolution, which is shown by the record to have been exercised, we are again confronted with the proposition: Was the action of the stockholders of the old Waters-Pierce Company in forming the new company, the present Waters-Pierce Oil Company, under the circumstances, a violation of the Texas laws? The fact must not be lost sight of that we have here an ownership by tenants-in-common of an existing property in which by far the larger element in the value thereof consisted of the good will incident to a long established and enormous business. We need not argue this element of value in view of the rule now firmly recognized and established that a few horses, wagons, and tanks, distributed over a large territory cannot be taken as the standard by which to determine the value of the entire property. And confronted with this situation, we submit that these stockholders had the right to dispose of their property as they saw fit, to organize a new company and have the property transferred to it just as they would have had the right, had there been two natural persons owning the stock, to have taken over the property themselves and to have continued the business of the old company or to have transferred the property to a corporation with which they had absolutely no connection, and then to have made an agreement with such company not to compete with it, as was held in **Gates v. Hooper.**

Unless it is held that by Section 2 of the Act of 1899, the Legislature of Texas intended to make it an offense for joint owners, whether as tenants-in-common or partners, to incorporate and transfer their common property to a corporation, or unless it be held that all existing partnerships and corporations were there-

by declared illegal, the conclusion must follow that what was done in the formation of the present Waters-Pierce Oil Company, this plaintiff-in-error, was as clearly within the terms of this statute as would be the formation of a new partnership or the continued holding by tenants-in-common of property which had devolved upon them by the death of a natural person or the dissolution of a corporation.

Referring again to the case of **Gates v. Hooper,** which was the last pronouncement of the Supreme Court of the State of Texas on the subject of trusts and combinations immediately prior to the formation of the present Waters-Pierce Oil Company, we find in that opinion the following discussion of what is meant by the term "combination" as used in the Anti-Trust Acts of that State:

> "In order to constitute a trust within the meaning of the statute, there must be a combination of capital, skill or acts by two or more. Combination, as here used, means union or association. If there be no union or association by two or more of their capital, skill or acts, there can be no combination; and hence, no trust. When we consider the purposes for which the combination must be formed, to come within the statute, the essential meaning of the word "combination" and the fact that a punishment is prescribed for each day that the trust continues in existence, we are lead to the conclusion that the union or association of capital, skill or acts denounced is where the parties in the particular case designed the united cooperation of such agencies **which might have been otherwise independent and competing for the accomplishment of one or more of such purposes."**

Conceding, that notwithstanding the fact that Mr. Pierce and the Standard Oil Company did no new or independent act by which their separate capital was brought together in a common enterprise, but as a matter of fact, were merely tenants-in-common of property cast upon them by the dissolution of the old company, and that, being in effect the inheritors of an existing status, even this did not of itself relieve them from the operation of this statute—conceding all this—are we not justified in insisting that before it can be claimed that there

was any combination in violation of the laws of Texas it must must be found that both Mr. Pierce and the Standard Oil Company had the legal right to enter the State of Texas as competitors in a common business? In answer to this, the opinion in **Gates v. Hooper** (*supra*) would seem to be conclusive, viz: That before there can be a combination it must be shown that "the parties in the particular case must have designed the united co-operation of such agencies **which might have been otherwise independent and competing.**"

The conclusion from this would seem to be irresistible that in order to hold that the formation of the present Waters-Pierce Oil Company was illegal we must give the laws of the State of Texas an extra-territorial effect and say that they can operate upon a contract made by or with a foreign corporation, which foreign corporation has not the legal right to enter the State and bring its entire business here; and this, too, in view of the settled law that if that foreign corporation should come here, the State has the right to change its laws and exclude it without regard to the question whether the act upon which the exclusion is predicated conforms to the Constitution of the United States or not. Can it be contended that a State may thus penalize a foreign corporation for not coming within its bounds to transact business, when it may exclude it at will, or penalize another person for making a contract with it outside of the State?

The case of the **State of Texas v. The Compress Company** (95 Texas 603; 69 S. W. 58), will be found in accord with the case of **Gates v. Hooper,** above referred to, both holding that a combination in violation of law cannot exist where competition is utterly impossible or improbable. And in **Ft. W. & D. C. Ry. Co. v. State** (87 S. W. 336 Texas), the rule is laid down that there can be no combination in violation of law where one of the parties to the alleged combination has not the legal right to do the alleged forbidden act without the consent of the other.

From these cases we deduce the proposition that in applying the Anti-Trust Laws of the State of Texas to any given state

of facts, we must first of all inquire and determine the status of the parties to the alleged combination and must find that they were free agents and natural competitors in some particular line of business in the State of Texas.

In the **Compress** case, above referred to, the Supreme Court of Texas, held that because competition between compresses was improbable, if not impossible, the law was not violated. In the **Railway** case, above referred to, the alleged violation of the law consisted of an exclusive contract between the Railway Company and a Sleeping Car Company, and the court held that because sleeping car companies had no legal right to operate their cars on the tracks of railway companies, there could be no combination between them.

We need not undertake to apply these cases to the facts as shown in this record, further than to say that the Supreme Court of Texas holds in each of them that in order to establish a case within the Anti-Trust Laws of the State, it is necessary to show both the right of competition and the probability of competition. Under the record herein, we find the Standard Oil Company has admittedly no right to enter the State of Texas, and we contend further that it is most improbable that the Standard Oil Company would enter the State of Texas even if permitted to do so since under the law it would have no right to remain in the State for any definite period whatsoever.

The case of **Ft. W. & D. C. Ry. Co. v. State,** above cited, presents another question bearing upon the discussion here involved, namely: Was it not incumbent upon the State of Texas in this case specifically to allege and prove that it would have been practicable and, in a business sense, possible for plaintiff-in-error to have secured its supplies of oil from some other source than the Standard Oil Company? It will be observed that in this case the Supreme Court of Texas waives this question as not being necessary to the decision, but if it must appear that competition is not only possible but probable, in order to sustain the charge of illegality where there is a direct combination, it would seem necessarily to follow that before plaintiff-in-error can be convicted of buying its supplies of

oils from the Standard Oil Company it must clearly appear that it could have obtained those supplies from some other source without injury to its business as the same had been uniformly conducted.

It is unnecessary to cite authorities in support of the proposition that nothing is ever presumed in favor of a judgment inflicting penalties, but that all necessary facts to support the conviction must be specifically alleged and proved. No allegation of the character above pointed out is contained in the petition of the State and there is not one item of proof in the record tending even remotely to show that plaintiff-in-error could have obtained its supplies from any other source, and in this connection it must also be remembered that the record wholly fails to show any proof of any agreement between plaintiff-in-error and the Standard Oil Company upon this subject. To sum up, then, we submit that no case could be presented in which the law was more uncertain in its terms or of more doubtful application to a particular state of facts than is presented by the record in this case. And when we take into consideration the further fact that after seven years delay in the institution of this prosecution, and then a denial to this plaintiff-in-error of every protection of the statutes of limitation, which are held to bar every other offense in the State of Texas except that of murder, the conclusion cannot be escaped that plaintiff-in-error has clearly been denied the equal protection of the laws and that the excessive fine imposed against it under the verdict, in the face of all these facts, results clearly in depriving it of its property without due process of law, in violation of its rights under the Federal Constitution.

(*a.*) IN INCLUDING PENALTIES FOR SUNDAYS IN THE ABSENCE OF PROOF SHOWING THE DOING OF BUSINESS ON SUCH DAYS, PLAINTIFF-IN-ERROR IS DENIED DUE PROCESS OF LAW.

As further bearing upon this question of excessive fine and the denial of due process of law to this plaintiff-in-error by

reason thereof, we desire to call the attention of the court to the fact that under the instruction of the trial court the jury found against plaintiff-in-error on each of the issues submitted for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for each of the days between April 1, 1903, and April 29, 1907, being 1488 days. Since this plaintiff-in-error was convicted of conducting its business as a merchant or dealer in oils, upon the charge that each day upon which it conducted its business constituted a separate offense, and there being no evidence that it conducted its business or made any sales on Sundays or holidays, the court should have so instructed the jury, that they must exclude the same from their computation, and whereas by said verdict it clearly appears that the same were included in their computation, this defendant contends that its property is taken from it without due process of law.

If the Sundays alone are deducted from the 1033 days for which plaintiff-in-error was convicted of violating the Anti-Trust Act of 1899, this would make a difference of 147 days, amounting to a difference in the verdict of the jury of $220,500.-00, and if Sundays only are deducted from the 1488 days for which plaintiff-in-error was convicted of violating the Anti-Trust Act of 1903, it amounts to a difference of 213 days, making a difference of $10,650.00 In other words, if the jury had excluded Sundays only from its computation, the total verdict as assessed against plaintiff-in-error would have been less by $231,150. Argument to sustain this proposition would seem unnecessary, for in the absence of any proof showing that plaintiff-in-error actually did do business on Sundays and in view of the fact that Sunday is *dies non* in law it seems uncontrovertible that these days ought to have been excluded in computing any penalty to be assessed. The presumption that plaintiff-in-error did not do business on Sundays would seem to be conclusive in the absence of proof to the contrary. Supposing it had been shown that plaintiff-in-error stopped business altogether for a period of one month at a time and of two months at another time and otherwise conducted its business

in an irregular way, transacting business part of the time and doing absolutely none at other times, it certainly would not be contended that a verdict against the defendant for the full number of days between May 31, 1900, and April 29, 1907, would have been justified or authorized. In further support of the contention that it must be presumed that plaintiff-in-error did not do business on Sundays, in the absence of proof, we submit the further fact that under the law of Texas it is unlawful to transact business on Sunday and certainly it cannot be presumed that plaintiff-in-error violated the law in order that the verdict of the jury may be sustained upon such presumption.

VIII.

THE TEXAS ANTI-TRUST ACTS OF 1899 AND 1903, ARE SO VAGUE, INDEFINITE, AMBIGUOUS AND UNCERTAIN IN TERMS AS TO FAIL TO DESIGNATE ANY OFFENSE WITH SUCH CERTAINTY AS TO INFORM THE PUBLIC IN ADVANCE OF THE CONSTITUENTS OF THE OFFENSE SOUGHT TO BE DEFINED AND PUNISHED, AND THE PUNISHMENT OF THIS PLAINTIFF-IN-ERROR UNDER SAID STATUTES DEPRIVES IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Referring first to the Anti-Trust Act of May 25, 1899, it will be seen that the purported definition of a monopoly as contained in the second section of the act has reference to "any union, combination, etc., of capital, etc. between persons, firms, corporations, etc., whereby any one of the purposes or objects mentioned in the act is accomplished or sought to be accomplished or whereby any one or more of said purposes are promoted or attempted to be executed or carried out or whereby the several results described in the act are reasonably calculated to be produced." Section 6 of the same act prescribes that "if two or more persons or corporations who are

engaged in buying or selling any article of commerce, manufacture, etc., shall enter into any pool, trust, agreement, etc., to control or limit the trade in any such article or thing they shall be guilty of a conspiracty to defraud."

We contend that section 2 of the Act of 1899 above referred to is not a sufficient definition of an offense either under the general rules as laid down by sections 3, 6 and 9 of the Penal Code of the State of Texas or under the general rules of law applicable to the definition of any and every penal offense as the same is described and forbidden by statute. We refer particularly to that portion of the section which prohibits as a monopoly any union, combination, etc., of capital, etc., between persons, corporations, etc., "whereby the several results described herein are reasonably calculated to be produced."

One of the things prohibited by the first section of the Act is any trust, agreement, etc., to regulate or fix the price of any article of manufacture, etc. It may be conceded that that portion of Section 1, sufficiently defines an offense against the laws but we do not concede that the language "Whereby the several results described herein are reasonably calculated to be produced" refers with certainty to a trust or agreement to regulate or fix the price of any article. The generality of the language is rendered still more obscure when we look to the preceding clause of the sentence in which is found "Whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished" or "whereby any one or more of said purposes are promoted or attempted to be executed or carried out." In view of these clauses which seem to cover the entire field so far as any combination having for its purpose or object the regulating or fixing of prices is concerned, it is impossible to determine what is meant by the clause, "Whereby the several results described herein are reasonably calculated to be produced."

In the 8th paragraph of the court's charge to the jury, one of the issues submitted was whether there had existed within the period mentioned in the petition a combination or union between plaintiff-in-error and the Standard Oil Company of New

Jersey, "whereby the price in Texas of such oil will be reasonably calculated to be fixed or regulated." We submit that this construction of the language of the statute is not justifiable. Let it be granted, however, that the expression "Whereby the several results described herein are reasonably calculated to be produced" embraces all means by which the price of an article is reasonably calculated to be regulated or fixed, we are even then not rid of the serious difficulty as to the meaning of the words, "are reasonably calculated to be produced." We must remember that we are dealing here with a penal law and with the definition which it purports to give to an offense, and that under the provisions of the Penal Code of Texas and under the provisions of generally well known and uniformly recognized principles of law, a law which does not designate an offense with such certainty as to apprise the public of what are crimes under the law so that people may avoid the unwitting commission of offenses is inoperative.

This same objection may be made to the law when it is sought to apply the language, "Whereby the several results described herein are reasonably calculated to be produced" to section 6 of the Act of 1899, which forbids any two or more persons engaged in buying or selling any article of commerce to enter any pool or trust to control or limit the trade in any such article or thing. The trial court, however, in paragraph 2 of its charge (Record, p. 1142), informed the jury that any union or combination of its capital, property, etc., by a corporation, with the capital, property, etc., of any other person whereby the trade in any article of manufacture or merchandise in Texas would be reasonably calculated to be controlled or limited was forbidden by the Anti-Trust Act of May, 25, 1899. We submit that unless people can know in advance what is meant by this language it cannot be treated as creating or defining a crime.

Section 6 of the Act of 1899, under consideration, declares it to be a conspiracy to defraud if two or more persons or corporations who are engaged in buying or selling any article of commerce, etc., enter into any pool, trust or agreement, etc.

to control or limit the "trade" in any such article or thing. In order that people may understand what this means, they must of necessity first know what the word "trade" signifies. In the case of **Queen Insurancne Co. v. State,** (86 Texas, 250; 24 S. W., 397), it was said that the word "trade" is employed in three different senses: first, in that of the business of buying and selling; second, in that of an occupation generally; and third, in that of a mechanical employment, in contra-distinction to agriculture and the liberal arts. Applying this language of the highest court in Texas, we are of necessity left wholly in the dark as to which one of these three meanings of the word "trade" was intended by the said Act. If the word "trade" was intended to signify the business of buying and selling, what then is meant by "controlling" and "limiting" such trade? If we understand the word "control" as equivalent to "monopolize" —and it is only by conjecture that this signification can be attached to it—what meaning shall we then attach to the word "limit?" Each of these words must be supposed to have a meaning of its own. If, then, "control" is synonymous with "monopolize," the word "limit" must mean something else, and what else? Does it relate to the territory within which the trade is conducted? Or does it relate to the amount or quantity of the trade that shall be carried on? This obscurity, we contend, is sufficient to condemn the expression "limit the trade" as being wholly lacking in that precision and certainty necessary in the definition of offenses punishable under penal statutes.

In the case of **Augustine v. State,** (52 S. W. 77), the question was presented whether a statute making murder, by "mob violence," an offense, sufficiently defines such offense within the rule prescribed by the Texas Penal Code as to the certainty requisite and necessary in stating the elements of a crime. The Texas Court of Criminal Appeals in an elaborate opinion held that the statute did not sufficiently define an offense within the provisions of the Penal Code. These provisions directly laid down in the law of Texas are no more than the concrete and local expression of general rules and principles

of law uniformly recognized and approved as a part of the law generally obtaining throughout these United States. They may well be considered as much a part of the "law of the land" as that which prohibits a conviction without trial.

In the case of **Queen Insurance Company v. State,** (86 Texas, 250), the Supreme Court of Texas, in construing the words, "restriction in trade," contained in the Anti-Trust Act of 1889, strongly intimated, if it did not indeed hold, that these words were insufficient to designate any offense with that certainty necessary to make it punishable.

We repeat that it is a general and uniformly recognized principle of criminal law of this country that, unless the law upon the subject of crime designates the offense with such certainty as to inform the public in advance of that which constitutes the offense, the law is inoperative and void, and any person who is deprived of life, liberty or property under and by virtue of such Act may well complain that his rights under the XIV Amendment to the Federal Constitution are being violated.

The recent case of the **M. K. T. Ry. Co. v. State,** (100 S. W. 766, Texas), is a direct and valuable authority upon this proposition. In that case, the R. R. Company was prosecuted by an action, civil in form, for violating an act passed in 1905, requiring railroad companies to erect water closets at all stations and imposing a penalty of $100.00 for each week that any railroad company should fail to comply with the statute. The question was fairly presented to the Supreme Court of Texas whether, within the provisions of the Fourteenth Amendment to the United States Constitution that no state shall deprive any person of property without due process of law, the statute in question not having fixed any time with which such water closets should be erected, was a valid penal law. The court held that the statute was not valid and in the course of its opinion said:

> "It is a well established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed and that the more severe the penalty

and the more disastrous the consequence to the person subjected to the provisions of the statute the more rigid will be the construction of its provisions in favor of such persons and against the enforcement of such law (citing Sutherland's Statutory Construction, 322, and Potter's Dwarris, 244). A penal statute such as now before us, must be couched in such explicit terms that the party upon whom it is to operate may with reasonable certainty ascertain what the statute requires to be done and when it must be done; otherwise there would be no opportunity for a person charged with the duty to protect himself by performance of it according to law. (Citing Sutherland's Statutory Construction, 324, Potter's Dwarris, 246-251; Tozier v. U. S. 52 Fed. Rep., 917.) In the case last cited, Judge Brewer said: 'But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether the jury may think it reasonable or unreasonable.' Looking at this statute in the light of the above rule of construction, we find that it denounces against the railroad company a penalty of $100.00 a week for each county through which it operates its passenger trains and in which it maintains passenger stations for a failure to perform any one of several things which is enjoined upon it by the terms of the Act. The court judicially knows (which is a matter of common knowledge) that the railroad of plaintiff-in-error extends through a large number of counties in which are many stations. The statute provides that the penalties shall be inflicted for each week that the railroad shall fail or refuse or neglect to perform the duty therein prescribed in each county and at each station, and the question arises: When shall the railroad company be liable for the first weeks' penalties? Does the week begin to run from the first day when the law took effect? And if so, how can the railroad company protect itself? Since it would be required within the one week's time, according to that construction, to place in all the counties through which it runs, and at every depot in each county a closet or closets with all the equipments therein prescribed? That this would be practically impossible is evident, and such a requirement would be so oppressive and arbitrary that by no authority could it be held to be "due process of law." If it did not run from the first day upon which the statute took effect,

what time did the railroad have in which to comply with the statute before the penalties would be inflicted upon it? There is not a sentence in the law from which the railroad companies of the state could determine the time allowed for the completion of the work required except under the construction that all must have been completed within one week from July 14, 1905; surely such a law if enforced would take from the railroad company its property in the penalties exacted by the statute without due process of law, in violation of the principles of right."

In the case of **Tozier v. U. S.**, (52 Fed. Rep., 917), cited in the above case by the Supreme Court of Texas, the defendant was indicted for having given an undue and unreasonable preference and advantage to one shipper over another in violation of section 2 of the Interstate Commerce Act. The question was presented to the court whether the prohibition against the giving of undue and unreasonable preference and advantage in rates is such a characterization of the element of a crime as to justify the prosecution and conviction of a person charged with violating the law. The Court, speaking through Mr. Justice Brewer, decided that the language was not sufficiently definite to designate the offense, and in reaching this conclusion he said:

"But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. Criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be definiteness and certainty."

While the Supreme Court of Texas in the **M. K. & T.** case predicates its decision upon the proposition that unless a penal law defines a crime with definiteness and certainty it violates the Fourteenth Amendment to the Federal Constitution, yet in the **Tozier** case, Mr. Justice Brewer goes even further and distinctly recognizes and applies the rule as one of general application in criminal jurisprudence, irrespective of the provisions of the Fourteenth Amendment. It is of course immaterial whether the necessity that a definite and certain statement of the constituents of an offense arises from a general principle of criminal law or from the provisions of the Four-

teenth Amendment, since in either case the rule embodying, as it does, a recognized legal principle as applicable, is binding upon all the courts of the land.

In the case of the **L. & N. Ry. Co. v. Commonwealth** (Kentucky), (35 S. W. 129), the Railway Company was indicted for violating a statute of Kentucky prohibiting extortion in rates upon the part of railroad companies. The defendant was convicted in the trial court and the case taken on appeal to the Supreme Court of Kentucky, which reversed the judgment below in an elaborate and learned opinion, in the course of which it uses the following language:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony as to whether or not an offense has been committed must also be conceded. The criminality of the carrier's act, therefore, depends upon the jury's view of the reasonableness of the rate charged. And this latter depends upon many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investments does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view and holding the rate reasonable find the same act not to constitute an offense. There is no standard whatever fixed by the statute or attempted to be fixed by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the view of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

In another portion of the same opinion the Court says:

> "When we look to the other side of the question, we find the contention of the state supported by neither

reason nor authority. No case can be found, we believe, where such indefinite legislation has been up-held by any court when a crime is sought to be imputed to the accused.'

The above authority would seem to show conclusively that in the opinion of the Supreme Court of Kentucky definiteness and certainty in the definition of an offense is necessary under the general principles of criminal law. The court, however, went further and held that an attempted definition of an offense, the same not possessing the requisite definiteness and certainty, is distinctly violative of the Fourteenth Amendment to the United States Constitution. This is clearly shown by the following language of the court:

> "If the infliction of penalities prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic law."

The court quoted the same portion of the opinion of Judge Brewer in the **Tozier** case that was quoted by the Supreme Court of Texas, in the **M. K. & T.** case, and also refers to the provisions of the law of the Chinese Penal Code, referred to by Judge Brewer in the **Tozier** case, which reads as follows:

> "Whoever is guilty of improper conduct and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows, and when the impropriety is of a serious nature with eighty blows."

The above was quoted by Judge Brewer to illustrate the proposition that there is very little difference between the Chinese law and a law which would make it an offense to charge more than a reasonable rate. The illustration is not without force in its application to the case at bar.

If we apply the legal principle, which was recognized and applied in the cases above cited, to the language, "whereby the several results described herein are reasonably calculated to be produced," and also the language, "to limit the trade in any such article or thing," it is apparent that the words convey no definite meaning, and that of necessity it must be left

to the jury to affix a meaning to them. As is clearly pointed out by the Supreme Court of Kentucky, different juries might then reach different conclusions upon precisely the same testimony, as to whether an offense had been committed or not within the meaning of such language, and the results must be as variable and uncertain as the views of different juries might suggest.

In this connection the following language used in the opinion in the case of the **Queen Insurance Company v. State,** above cited, is peculiarly apposite:

> "There is a maxim, that ignorance of the law excuses no one, which is not true as applied to every case. For a man is not guilty of theft who honestly takes property under an honest claim of right, though he may be mistaken as to the law. But it is true in the sense that no one can allege his ignorance of the law, which makes a certain act penal in justification of his commission of that act. If he be held bound to know the law, he should have the means of knowing it, and hence he should not be punished for the infringement of a statute unless it designates, with a fair degree of clearness and precision, the act or omission which is forbidden by it. The offense need not be defined in the logical or legal sense of that word, for general terms may be used which in themselves require to be defined. But the terms employed should be sufficiently definite in their meaning as plainly to designate the very act which is sought to be made punishable by law."

In discussing this same point, Mr. Hughes, in his recent scholarly work on Criminal Law, Sec. 2429, says:

> "The legal maxim '*ignorantia legis neminem excusat*' in its application to the law of crimes is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se*, **or where the law is well settled and plain,** the maxim, ignorance of the law excuses no one, in its rigor will be applied, but where the **law is not settled, but is obscure,** and where the guilty intention being a necessary constituent of the offense is dependent upon the knowledge of the law, this rule, if enforced, would be misapplied."

In **Cutter v. State** (36 N. J. Law, 125), defendant, a Justice of the Peace, was indicted for extortion in taking fees to which he was not entitled. The defense set up was uncertainty in the language of the statute, and that the defendant had taken the monies innocently and under the belief that he had a right to take them. The court uses the exact language above quoted from Hughes on Criminal Law, and adds:

> "To give the maxim any force in such instances would be to turn it aside from its rational and original purpose, and to convert it into an instrument of injustice."

The same construction is recognized and applied in **Rex v. Hall,** 3 Car. P. 409 (Eng.), and in **State v. Brown,** 38 Kan. 390; 16 Pac. 259.

Turning now to the Act of 1903, we contend that the same obscurity is presented here as in the Act of 1899. In the first subdivision of Section 1 of the Anti-Trust Act of March 31, 1903, a trust is declared to result from the combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons "which create, or may tend to create or carry out restrictions in the free pursuit of a business authorized or permitted by the laws of this state (Texas)." This section is the basis of the 9th paragraph of the trial court's charge to the jury (Record, P. 1146), wherein the issue was submitted whether the defendant (plaintiff-in-error) had entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas or carry out in Texas, restrictions in the free pursuit in that state of the business of selling oil refined from petroleum.

If we grant for the purpose of argument that the term "restriction in the free pursuit of a business" is sufficiently definite to constitute an offense—which, however, we expressly do not concede—the difficulty remains of attaching any definite meaning to the expression "tending to create restrictions in the free pursuit of a business." The obscurity in the above language is the same as that which we have heretofore discussed in the

language of the second section of the Act of 1899, "whereby the several results described herein are reasonably calculated to be produced." Even if it were possible to form an adequate conception of a restriction in the pursuit of a lawful business, it is not possible to do so in respect to what may "tend" to accomplish that result. The only limitation upon "tendencies" is the fertility of the human mind in tracing the association or connection of events. An astute metaphysician, a profound logician, a skilled scientific thinker, all these may well perceive a tendency, which persons of ordinary mental capacity, minds not trained to such a high degree of scientific accuracy in perception and reasoning, would certainly not be so keen to discover, or probably never discover. What shall be the test or criterion by which to determine whether or when one thing "tends" to produce another? We submit that it is hard to imagine a case in which indefiniteness could be more indefinite, uncertainty more uncertain.

We desire further, to call the attention of the court to the fact that, while the trial court failed entirely to make any concrete application of that portion of Section 1 of the Act of 1903, which purports to define a trust as "a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons to create, or which may tend to create, or carry out restrictions in trade," yet it included such purported definition in that portion of its charge in the second paragraph (Record, p. 1143), wherein the court sought to inform the jury what things constitute a trust under the Anti-Trust Act of 1903. Consequently, if the jury considered at all—and we must assume that it did—the abstract definition given by the court of a trust under the Anti-Trust Act of 1903, we must conclude that the jury attached enough importance to the charge given by the court upon the subject, to attempt to apply the same to the facts presented in evidence. This same expression "restriction in trade," was the very expression so emphatically condemned by the Supreme Court of Texas in the case of the **Queen Insurance Company v. State,** *supra*, as being wholly insufficient to designate an offense. If, then, the

term "restriction in trade," possesses no definite meaning, how much more uncertain, ambiguous and indefinite must be the statement "which may tend to create restrictions in trade."

Section 2 of the Anti-Trust Act of 1903 defines a monopoly as a combination or consolidation of two or more corporations affected by the direction of the affairs of such two or more corporations being in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust, as defined in the first section of the Act. In the tenth paragraph of the trial court's charge to the jury (Record, p. 1147), it submitted as an issue the bringing of the affairs of plaintiff-in-error and the affairs of the Standard Oil Company of New Jersey under the same management or control under such circumstances that such management or control created or tended to create or carry out restrictions in the sale in Texas of oil, in contravention of the above prohibition.

The argument above submitted, as to the uncertainty and indefiniteness of the words "which tends to create a restriction in trade," applies with equal force to this section, we deem it unnecessary to repeat it. This indefiniteness and uncertainty which we contend characterizes both the Acts of 1899 and 1903, for the alleged violation of which this plaintiff-in-error stands convicted, are of importance enough to demand further discussion than we have hitherto indulged in, even at the risk of becoming tedious.

If the designation "whereby the several results described herein are reasonably calculated to be produced," as the same is used in the Act of 1899, should be applied to offenses generally, its inadequacy as a definition would be recognized at a glance. For example, if after defining the elements of murder, the statute should further conclude by denouncing as an offense anything "whereby murder is reasonably calculated to be produced," there would be no hesitation in pronouncing the so-called definition utterly insufficient to describe a crime. Let it be supposed that such a statute should provide that anything reasonably calculated to produce the crime of murder

should constitute an offense. What information would be furnished to the public in respect to what was intended to be forbidden? Would the purchase, loading or carrying of a revolver be reasonably calculated to produce the crime of murder? Would the conversation between two men in which they agreed that a certain individual was such a bad citizen that his assassination would be justifiable be reasonably calculated to produce the crime of murder? Would the use of denunciatory and defamatory language which, if it reached the ears of its object, would doubtless so incense him as to provoke his resentment be reasonably calculated to produce the crime of murder? Would the bearing of personal malice toward an individual be reasonably calculated to produce the crime of murder? If these or any of these things should be deemed reasonably calculated to produce crime, what assurance have we that different men would agree in the conclusion as to the probable result? We might certainly expect as many different verdicts as there would be different juries in respect to these or any of these questions. If it should be left to the discretion of a jury to determine that a person whose words, acts or purposes brought him within any of these hypotheses, according to which conceivably a jury may consider him guilty of that which was reasonably calculated to produce murder, what safety would there be for any man in society? His life or his liberty would ever depend upon what some particular jury might think as constituting a violation of the law, and, in advance of a verdict in his particular case, he would have no means of determining whether what he had regarded as harmless would be considered by the jury as criminal. Surely, in a civilized country whose proudest boast is that it is governed by law and not by men, no person should be condemned as a criminal upon such uncertainties as these.

Let us finally apply the idea we are seeking to emphasize to a supposed case having a direct relation to the statute under consideration. Suppose that two merchants, residing in a town not reached by any railroad, should agree that they were to oppose a proposition for a railroad company to con-

struct its line into and through the town in consideration of the donation of a certain amount of right-of-way and depot grounds in the town, and a certain amount of money. These merchants might honestly think that the building of a railroad through their town would cut off a certain amount of trade by inducing the building of other towns in the vicinity, and, upon this idea alone, base their opposition. Would the combination of their acts in opposition to the building of this railroad line be reasonably calculated to limit the trade in the goods sold by them in their community—would it tend to produce a restriction in trade? A jury might well think that such was the object and such was the effect of the combination, and yet, every intelligent man would stand appalled at the proposition that these merchants had violated any law. If it is to be left to a jury to say what is reasonably calculated to produce a certain result, what remedy will a person, deemed by such a jury to be guilty, have after conviction? The very fact that the matter was in the discretion of the jury would necessarily deprive a convicted person of any redress in an appellate tribunal under a system of jurisprudence under which the findings of juries upon a question of fact are conclusive.

From the foregoing, we contend that a distinct federal question is here involved, namely whether the definitions in the Texas Anti-Trust Acts of 1899 and 1903, for the alleged violation of which this plaintiff-in-error stands convicted, are sufficiently certain to afford that due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

It does not seem necessary to encumber this argument with any further citation of authorities on what is "due process of law," but it seems advisable to point out at least a few authorities which deal with this point, and which have more or less direct reference to the peculiar question here involved.

In the **C. B. & Q. Ry. Co. v. Chicago** (166 U. S. 226), this court, in discussing the term "due process of law," uses the following language:

> "But a State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment; its judi-

cial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, **and yet it may be that its final action would be inconsistent with the amendment.** In determining what is "due process of law' regard must be had as to substance and not to form."

Inasmuch as the restraint of the Fourteenth Amendment applies as well to the legislative as to the judicial and the executive departments of the government, it is unnecessary either to cite authorities or argue to establish the proposition that everything that may pass under the form of legislative enactment is not always "due process." If it were, then, the restriction placed upon the legislative department is meaningless and valueless. In the Dartmouth College case (4 Wheaton, 518), Mr. Webster gave the following definition of "due process of law," which has often since been quoted with approval:

> "By the 'law of the land' is most clearly intended the general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not 'law of the land' "

In **Hagar v. Reclamation District** (111 U. S. 701), this court observed:

> "It is sufficient to observe here that by 'due process of law' is meant one which, following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by the law, it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In the **State v. Loomis** (115 Mo. 307), the Supreme Court of

Missouri declared the constitutional declaration: "That no person shall be deprived of life, liberty or property without 'due process of law.'" was designed to protect and preserve the existing rights of the citizen against arbitrary legislation as well as against arbitrary executive and judicial acts.

In the case of **People v. Gillson,** (109 New York, 389), the court speaking through Judge Peckham, now a member of this Court, said, in passing upon the question of "due process of law,"

> "The legislature cannot without reason and arbitrarily infringe upon the liberty or the property rights of any person within the protection of the constitution of this state. And although every legislature may determine what is proper exercise of its police power, its decision is subject to the scrutiny of the courts."

From these decisions, which might be greatly multiplied, it seems manifest that the Fourteenth Amendment, in providing that no person shall be deprived of life, liberty or property without due process of law, was not only designed to prevent the state from depriving any person of a trial in some regular form of judicial proceeding, but was also intended to prevent the states from enacting arbitrary, capricious and uncertain laws which would necessarily have the effect of depriving persons of their life, liberty or property. It is true that, under all the authorities, it is necessary that the law shall proceed upon inquiry, shall give the accused the right to be heard in his own defense and shall condemn only after hearing. More than once it has been decided that a personal judgment cannot be rendered without personal service. But of what avail would notice or hearing or trial be, if that of which notice is given has no meaning or, what is equivalent to the same thing, is so uncertain and indefinite that its meaning cannot be ascertained? In the **M. K. & T. Ry. Co.** case, (100 S. W. 766, Texas), and in the **L. & N. Ry. Co.** case, (35 S. W. 129, Kentucky), it is expressly decided that a penal statute, to use the language of Judge Brown in the former case:

> "Must be couched in such explicit terms that the parties upon whom it is to operate may with reasonable certainty

ascertain what the statute requires to be done and when it must be done, otherwise there would be no opportunity for a person charged with the duty to protect himself by the performance of that according to law."

In each of these cases the statute was condemned as unconstitutional and void, by reason of its conflict with the "due process of law" clause in the Fourteenth Amendment in that it failed to define the thing forbidden with such certainty and definiteness as to inform persons in advance of the constituents of the offenses attempted to be defined. We submit that under all the authorities the above statutes fall within this forbidden class and that thereby this plaintiff-in-error, against whom an enormous fine has been assessed by reason of an alleged violation of these acts, is deprived of its property without "due process of law," contrary to the XIV Amendment to the Federal Constitution.

IX.

THE DENIAL OF ANY PERIOD OF LIMITATION IN BAR OF A SUIT AGAINST PLAINTIFF-IN-ERROR TO RECOVER FINES OR PENALTIES OR FORFEIT ITS PERMIT TO DO BUSINESS, IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS AND DEPRIVES PLAINTIFF-IN-ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

From the time our forefathers declared in the Declaration of Independence that all men are created equal, if there has been any one principle that has been more sacred to the American citizen than any other, it has been that the laws of the country shall operate with equality and uniformity upon all persons subject thereto and that the laws shall be administered with such fairness and impartiality that all litigants shall be treated alike by the courts. This fundamental principle was expressly embodied in our constitutional law when the Fourteenth Amendment was adopted, but even before that time its recognition had been universal, so much so, in fact, that it had

not even been deemed necessary to make express provision for its preservation in the Federal Constitution as originally written.

In answer to the suit of the State of Texas herein, plaintiff-in-error specially pleaded the statute of limitations as found in Article 219, of the Texas Code of Criminal Procedure, and Articles 3354 and 3358 of the Revised Civil Statutes of Texas, being all the statutes of that State in anywise bearing upon the facts presented by the petition of the State. The exceptions of this plaintiff-in-error to the petition of the State of Texas, objecting that the cause of action of the State, if it had any, was barred either under one or all of these statutes, were respectively overruled, thereby denying this plaintiff-in-error the equal protection of the laws, contrary to the provisions of the federal constitution and denying it the "Due Process of Law" guaranteed by the same constitution.

(*a.*) BAR OF STATUTE OF LIMITATION UNDER ARTICLE 219, TEXAS CODE OF CRIMINAL PROCEDURE.

It will be remembered that plaintiff's original petition herein was not filed until the 22nd day of September, 1906, and on the face of plaintiff's pleadings, plaintiff's cause of action, if any it ever had, as to the fines and penalties sought to be recovered, accrued more than two years before the filing of the suit. For this reason it was objected that plaintiff's cause of action, if any it had, was barred by the statute of limitation of two years as prescribed in Article 219 of the Code of Criminal Procedure of the State of Texas.

In the argument under Section *a* of Paragraph 2 herein, in support of the proposition that the *ex post facto* effect of a law cannot be evaded by giving it a civil form, we have already quite fully discussed the proposition that the respective Anti-Trust Acts of 1899 and 1903, for the violation of which this plaintiff-in-error stands convicted, must be treated as penal laws, notwithstanding the civil form of the action by which the State of Texas has sought to enforce the same and punish the

violation thereof. In this connection we beg to refer the court to the argument and authorities above cited.

If we are correct in the position that the state's cause of action is criminal in its nature, it logically follows that the limitation applicable is that prescribed by Article 219, of the Code of Criminal Procedure of Texas, which is as follows:

> "For all misdemeanors an indictment or information may be presented within two years from the commission of the offense and not afterward."

Our conclusion here must be correct, unless it be that the offense with which plaintiff-in-error is charged is not a misdemeanor or because the prosecution is not by indictment or information.

It is true that neither of the Anti-Trust Acts above mentioned characterizes the violations thereof as misdemeanors, but since each statute denounces such violations as an offense and prescribes penalties for the wrong done to the public, such offense, under the Texas Penal Code (Article 55) must either be a felony or misdemeanor, a classification well recognized in our general criminal jurisprudence. The article referred to, prescribes that every offense which is punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony, and every other offense is a misdemeanor.

If it be contended that in order to constitute an offense or misdemeanor, it is necessary that it shall be so denominated, we submit that, in view of the express provisions of the Penal Code declaring what offenses constitute felonies and what offenses constitute misdemeanors, it is superfluous in any case to state expressly whether the offense is one or the other. The penalty prescribed must, of necessity, give it the character of one or the other; furthermore, an examination of the Penal Code of the State of Texas, as well as that of other states in the Union, will show that a large majority of offenses therein described are not characterized expressly either as felonies or misdemeanors, but their character is left to be determined entirely by some such statute as the above one quoted from the

Texas Penal Code, describing what penalty attaching to an offense shall constitute it a felony and declaring that all others shall be misdemeanors. Occasionally a forbidden thing is called a felony and occasionally a forbidden thing is called a misdemeanor. But in the great majority of instances the elements of the offense are given and the penalties prescribed, without stating what it is, without stating whether it be a felony or misdemeanor. It seems incontrovertible that, whereas the punishment under the Anti-Trust Acts of 1899 and 1903, (certainly in so far as they are possible of application to this plaintiff-in-error under the latter act) consist of pecuniary fines, the offenses therein described of necessity fall within the class of misdemeanors.

If it be objected that Article 219, of the Code of Criminal Procedure is not applicable because the prosecution in this case was neither commenced by indictment or information, we answer that, while technically neither an indictment nor information was presented against this plaintiff-in-error, yet, the proceedings instituted by the Attorney-General of the State of Texas, and the county attorney of Travis County in the District Court of said County against this plaintiff-in-error, constituted an information within the strict legal meaning of that word.

In the case of **Klepper v. State,** (4 Texas, 242), it was contended that in view of the provisions of the constitution then in force that no person should be holden to answer for any criminal charge but on indictment or information, a prosecution commenced by complaint, sworn before a Justice of the Peace, was unconstitutional and void. The Supreme Court of Texas, disposed of the contention in this language:

> "The word information implies no particular form. It requires nothing more than that the accused shall be informed thereunder of the nature of the offense with which he is charged and put on trial. And this requisition is fully answered by the warrant on which he is brought before the Justice for trial."

This statement of the law is in harmony with the general

rule well-recognized, a careful statement of which is found in Cyc. Vol. 22, p. 186:

> "An information is a written accusation of crime preferred by the District Attorney, or other public prosecuting officer without the intervention of a grand jury."

It is pertinent to observe here that unless the word "information" is given the broad signification for which we contend, a prosecution commenced at the present time by a complaint before a Justice of the Peace and by the issuance of a warrant by him, would never be barred by the statute of limitation; and certainly it will not be contended that offenses cognizable before a Justice of the Peace are not subject to limitation, yet the only statute under which such limitation could be asserted in such cases is the one upon which we here rely, namely, Article 219, of the Code of Criminal Procedure.

We wholly fail to appreciate the idea that there is an insurmountable and impenetrable barrier between the Penal Code and the Code of Criminal Procedure and the provisions of the Revised Civil Statutes, whatever may be their nature, so that in no case can the provisions of the criminal law be looked to and applied in actions which are civil in form. We apprehend that our system of jurisprudence is a unit and not a series of isolated things, and that the provisions of the Civil Statutes may be invoked in prosecutions criminal in form and that the provisions of the Penal Code and Code of Criminal Procedure may be invoked in actions civil in form, whenever the nature of the cause of action is criminal. If the provisions of the civil statutes cannot be looked to at all in criminal prosecutions, then there is no way by which a jury may be obtained in criminal cases, since the only provisions covering the selection of juries are to be found in the Civil Statutes. So, again, we find as a general law obtaining in practically every state of the Union that when a defendant in a criminal cause seeks to obtain the testimony of a witness by taking his deposition, he does so by virtue of the Civil Statute prescribing the form and means for taking such deposition.

The contention herein is supported by decisions in the State

of Texas, and it would seem unnecessary to go beyond these for authorities.

In the case of **Stucksbury v. Swan,** (85 Texas, 563), the Supreme Court resorted both to the Penal Code and the Code of Criminal Procedure to determine the law with reference to the propriety of the Court in a civil case charging upon presumptions and the burden of proof.

In the case of the **Queen Insurance Company v. State,** (86 Texas, 250; 24 S. W. 397), a suit more closely applicable to the facts herein, a civil action was brought against a number of insurance companies to enjoin them from carrying out an agreement with respect to agents' commissions and for the forfeiture of the several defendants' permits to do business in Texas. The gravamen of the complaint of the State in that case was that the alleged agreement among the insurance companies was in violation of the Anti-Trust Act of 1889, which was then in existence. The Supreme Court, however, held that the words, "restrictions in trade," used in the Anti-Trust Act of 1889, did not sufficiently define an offense against the laws, and in determining that question the court quoted and discussed articles 3, 6 and 9 of the general provisions of the Penal Code, together with the decisions of the Court of Criminal Appeals construing those provisions. From this, we have no hesitation in suggesting that if the provisions of the Penal Code are applicable to the Anti-Trust Act of 1889, they are equally applicable to the Anti-Trust Act of 1899.

We have already referred in argument, under a foregoing section, to the recent case of the **M. K. & T. Ry. Company v. the State,** (100 S. W. Rep., 766), wherein the Supreme Court of Texas had occasion to pass upon an Act of the 29th Legislature of Texas, requiring railroad companies under penalties to provide and keep separate water-closets at each passenger station on their lines of railway. In the course of that decision, the court repeatedly spoke of the statute as a penal statute, and in referring to the necessity of a penal statute defining the

forbidden thing with reasonable certainty, the court referred with approbation to the language of Judge Brewer in a Federal Court case, in which he declared that in order to constitute a crime, the act must be one which the party could be able to know in advance whether it was criminal or not. The suit in the **M. K. & T. Ry. Co.** case was civil in form, for the recovery of penalties against the railroad company, yet the Supreme Court of Texas clearly recognized that the thing charged was a crime, and invoked a well recognized rule of criminal law in deciding the case.

The case of the **Commonwealth v. The Equitable Life Assurance Co.,** (38 S. W. 491), bears closely upon the question under discussion. In that case a suit, civil in form, was instituted by the State of Kentucky against the Insurance Company to recover a fine from the defendant for the violation of the provisions of the Kentucky Statute forbidding rebates of premiums, payable on policies issued by the defendant. After holding that a demurrer filed by the defendant to plaintiff's petition must be sustained, the Supreme Court observed:

> "The only question presented by the demurrer aforesaid is whether said action at the date of its institution was barred by the statute of limitations in such cases made and provided. It is contended by appellant's counsel that the limitations provided by section 2515 of the Kentucky Statutes, which is fixed at five years, applies to actions brought under section 656 of the Kentucky Statutes and in support of his contention he makes a very ingenious argument. On the other hand, it is contended by appellee that the limitation upon actions under this section is fixed by the provisions of section 1138, and expires in one year from the date of their violation. In our opinion, these sections of the Kentucky Statutes are intended to relate to two entirely different causes of actions and are in no sense repugnant to each other, although they both apply to actions to recover penalties. Section 2515, is found in Chapter 80, a chapter devoted entirely to fixing limitations upon all causes of civil actions, while section 1138 is found in chapter 36, which is entirely devoted to the subject of crimes and their punishment. This is certainly a penal action brought to

recover a penalty for the violation of a penal statute, which is imposed as a punishment for a public offense; and, in our opinion, the limitation upon the same is one year from the date when said cause of action accrued. Section 2515 was intended to apply to civil actions where damages in the nature of a penalty are annexed. The distinction between these two sections was pointed out by this court in the case of Brown v. Commonwealth, 91 Ky. 480; the judgment of the lower court is affirmed."

It is true, as shown by the case of **Boyd v. Randolph,** (16 S. W. 133), referred to by the Court, that under the head of "Crimes and Punishments," in the statutes of Kentucky, it is provided that "prosecution for the recovery of a penalty for the violation of any statute or penal law and any action or procedure at the instance of any person to recover any such penalty shall be commenced within one year." This statute evidently applies both to prosecutions by the state to recover penalties for the violation of the penal statutes and also *qui tam* actions brought by informers, and it is to the latter cause of actions that the latter portion of the provision relating to an action or procedure refers. Since the action in the Equitable Life Assurance Company was not *qui tam*, but was brought directly by the state, for its sole benefit, it is evident that the court in that cause applied the provisions contained in the criminal statutes for the bringing of prosecutions within one year, to an action civil in form to recover penalties in favor of the state for the violation of a public statute. If we do not misconstrue this case, it is an authority directly upon the point herein presented to the court.

We cannot help observing that if the object of a suit is to recover penalties for a public wrong, to sanction the proposition that the rules of the civil statutes are to apply whenever the action is civil in form, but that the rules of the criminal statutes are alone to apply whenever the action is criminal in form, even though the object in each case is one and the same, and each is designed to punish a violation of the law, is as clear a case as can be conceived, in which the substance is sacrificed to the form. We cannot believe that our courts will countenance any

such distinction, when the result would be to produce the most serious inequalities in the administration of justice by virtue of, not what an accused person has done, but by virtue of the method in proceeding against him. We cannot concede that this is that "due process of law" which is guaranteed by the Federal Constitution.

It is true that the Court of Civil Appeals of Texas, in the case of the **Waters-Pierce Oil Company v. State**, (44 S. W. 936), refused to recognize the rule that in a prosecution in a civil suit to recover penalties for violating the Anti-Trust Laws of 1899, the guilt of the defendant should be established beyond a reasonable doubt. An examination of that case and the facts before the court will show that all that was said by the court on that point must be regarded as *dicta* since it clearly appears from the decision that that particular question was not properly raised. We wish to state further that it is very probable that the attention of the court was not called to the point that the suit, through civil in form, was based upon a cause of action criminal in its nature. This would seem to be indicated by the following language used by the court in its opinion in the case:

> "This is a **civil** controversy and, as has been previously said by this court in an opinion in which a number of cases were cited, in no controversy of a civil nature would it be proper for the courts of this state to give such a charge."

The authority referred to by the court was the case of **Pace v. The Land and Mortgage Co.,** (43 S. W. 36), in which the question decided was whether in a case in which it is sought to prove by parol evidence mutual mistake or fraud in a written contract for the purpose of having such written contract changed, the law required proof of that fact to be made beyond a reasonable doubt. It is very probable that in repudiating the doctrine of reasonable doubt as applied to the case before the court, the court had in mind the law, which is so well stated by Judge Sanborn, in the case of **U. S. v. Shapleigh,** (54 Fed. Rep., 134), as follows:

> "It is now settled by the great current of the authorities in this country that where a criminal act is alleged in a civil suit—in a suit that is civil not in form merely, but in its nature and purpose—proof of the criminal act beyond a reasonable doubt is not required to warrant a verdict or decision in favor of the party who makes the allegation."

The force of the **Pace** case, above referred to, is further weakened by the fact that Chief Justice Fisher, who wrote the opinion in that case, expressed in a separate opinion in the case of the **State v. Waters-Pierce Oil Company,** *supra*, serious doubt as to whether the latter case was a criminal case, in view of the overwhelming weight of authority to the effect that it was. The court of Civil Appeals of Texas, in the Waters-Pierce Oil Company suit, above referred to, further held that a suit, civil in form, brought by the state to recover penalties for violations of the Anti-Trust Act of 1899, was not a criminal case within the meaning of Section 26, Article 5, of the Constitution of Texas, providing that the state shall have no right of appeal in criminal cases. The decision of the Court of Civil Appeals was based upon its construction of Section 8 of Article 5, of the constitution of Texas, defining the jurisdiction of the District Court. We do not question that the court reached the correct conclusion in that case when it held that a suit to recover penalties is not a criminal case within the meaning of the section of the constitution defining the jurisdiction of district courts. There were, probably, however, some expressions in the opinion of the court which were not at all necessary to the proper disposition of the case. The court held that the overwhelming weight of authority seemed to support the proposition that the term term, "criminal case," when other language is not used indicating a restricted meaning, includes every proceeding on behalf of the state for the enforcement of a penalty prescribed for the violation of a statute. The court, however felt constrained, on account of the apparent meaning of the words, "criminal cases," used in defining the jurisdiction of district courts, to hold that the suit to recover penalties for the violation of the statute is not a "criminal case," as that term is used in the constitution of Texas, de-

fining the jurisdiction of the courts. The real question before the court was what is meant by the term, "criminal case" in the constitution, in respect to the question of jurisdiction. The court had in mind that the provisions of the constitution, which were considered in that case, had relation only to the matter of jurisdiction, viewed with respect to the form of proceeding; for the constitution, employing the term, "criminal cases," evidently has reference to the form in which said proceedings are instituted.

Without stopping to draw nice distinctions or split hairs between causes of action of a civil and those of a criminal nature, the design of the Court of Appeals was to make it clear that the district court should have jurisdiction in all criminal cases of the grade of felony prosecuted by indictment and in all suits, civil in form, brought on behalf of the state to recover penalties for forfeitures and escheats. We must proceed upon the assumption that the makers of the constitution were familiar with the universal rule of law that a suit by the state to recover penalties for the violation of a statute is founded upon a cause of action, criminal in its character. If there had been occasion for them to express themselves on the subject, they would have so declared; but for the purposes of their work—for the purpose of defining and limiting the jurisdiction of the courts of the state— there was no occasion for them to make any declaration upon the subject.

It seems apparent that the words, "criminal case," as employed in the Texas Constitution, and as used by the court in the **Waters-Pierce Oil Company** case, have a somewhat more restricted meaning than is attached to them in most of the cases of actions for the recovery of penalties; as already pointed out, this limited meaning was affixed solely with reference to the question of jurisdiction of inferior courts. It may be that, as a general proposition, the term, "criminal case," indicates merely the form of proceeding. If this is true, then when the courts have spoken of a suit by the state to recover penalties for the violation of a statute as a "criminal case," they have clearly fallen into an inaccuracy.

In the case of **Wisconsin v. Pelican Insurance Co.** (127 U. S. 265), which we have already discussed, Mr. Justice Gray, doubtless appreciating the confusion (double meaning) resulting from the meaning of the term, "criminal case," refers throughout the decision to the plaintiff's cause of action as one "criminal in its nature." This method of treating the subject relieves it of the embarrassment produced by the ambiguity of the term, "criminal case." In short, if we consider that term as relating to the form of proceeding as distinguished from the cause upon which the proceeding is founded, we get a clearer view of the subject. The distinction drawn is a sound one, because we readily appreciate the distinction between the form in which a case is brought and the cause of action which constitutes the foundation of the suit. It is evident that the attention of the Court of Civil Appeals of Texas was not directed to this distinction when discussing the **Waters-Pierce Oil Company** case, nor was it necessary that it should be, in the light of the facts which were then before the court and concerning which a decision was sought. It is to be noted in passing that the **Waters-Pierce Oil Company** case, which went on writ of error to this Court, (177 U. S. 28), was decided by this Court in a brief opinion which did not in any wise touch upon the question here under discussion.

We submit that the value of the decision in the case of the **State v. The Waters-Pierce Oil Company,** by the Court of Civil Appeals of Texas, as constituting a precedent, must be limited to the one great question which was before the court and which was no doubt correctly decided. Mr. Chief Justice Fisher, in a separate opinion stated that, in view of the overwhelming weight of authority on the subject, he was not prepared at that time to assent to the view that the case was not a criminal case, although he said that he did not intend his statement to be considered as an express dissent from the view of the majority of the court. He evidently had in mind the unbroken line of authorities holding that the fact that the suit for penalties is civil in form, does not change the character of the cause of action, which is criminal in its nature. Like Judge

Bradley in the **Boyd** case, and Judge Sanborn in the **Shapleigh** case, he looked upon the term, "criminal case" as including that upon which the cause of action itself is founded.

In further argument on this point, we desire to call the attention of the Court to the term, "criminal case" as used in the Fifth Amendment to the Constitution of the United States, which declares that no person shall be compelled in a "criminal case" to be a witness against himself. It is uniformly recognized that the phrase as used here is used in its most comprehensive sense, as indicating not merely the form but the substance of the action. We have already shown that the use of this phrase in the Texas Constitution, in prescribing the jurisdiction of courts, relates to the form of the proceeding only; the same expression used in the Fifth Amendment to the Federal Constitution refers to both form and substance. There is no conflict here with respect to the use of the term. Definite objects were in view. The phrase, as used in the Constitution of Texas, regarded merely the form of the proceeding, since nothing further was necessary in determining the jurisdiction of the different courts of the state; but in the Fifth Amendment to the Federal Constitution, in view of the fact that the same injustice would be done the defendant if he should be required to be a witness against himself in a civil proceeding based upon a criminal cause of action that would be inflicted upon him if he should be prosecuted by indictment or information, the phrase was employed in such a sense that it serves as a shield to any person charged with the violation of a penal law, irrespective of the method or form adopted or employed to enforce such law.

That offenses should be subject to the law of limitation is universally recognized in the legislation of every state in the Federal Union. And so important is the protection of limitation that the universal rule appears to be that the defendant accused of an offense is not even required to set up specifically the bar of the statute; in other words, the prosecution for an offense cannot be sucessfully maintained after the lapse of the statutory time for its institution. In this cause, in which

under the Anti-Trust Act of May 25, 1899, the penalty for each violation of the Act is any sum not less than $200.00 nor more than $5,000.00 per day, and in which the jury for the alleged violation of the act imposed penalties upon plaintiff-in-error at the rate of $1,500.00 per day for a period of 1033 days, the value of the limitation to this plaintiff-in-error cannot be overestimated. If the State of Texas, in its prosecution under the above act is subject to no limitation, then it can wait any indefinite period of time until penalties have accumulated to such an extent that their enforcement will wipe out every vestige of property owned by any defendant. We have already pointed out that this case, though civil in form, by virtue of the fact that the cause of action upon which it is predicated is criminal in its nature, must be held to come within the meaning of the terms of the statute of limitation prescribed by Article 219, of the Code of Criminal Procedure, above quoted. If it be contended that the terms of that statute do not literally embrace this case, we submit that since in construing the statute of limitation as well as other statutes, the primary rule of construction is to ascertain the legislative intent, there can be no reasonable doubt that Article 219, was intended to apply to this class of cases as well as to cases prosecuted by proceedings distinctly criminal in form. We apprehend that the court will find much less difficulty in bringing this case within the application of the above statute of limitation than was experienced by the courts in deciding that the English Statute of James I., prescribing periods of limitation, applied to and included the action of *assumpsit*. In referring to the Statute of James I. and its construction by the courts, Mr. Wood, in section 16, of his scholarly work on Limitations observes:

> "Although there is no express mention of the action of *assumpsit* which was at the period of its enactment the most important of all actions, yet, as it was clear that this omission was unintentional, it was construed as embracing that action by fair intendment, and as coming within the reason of the statutes, and also coming under the head of trespass on the case."

We further apprehend that the court will find less difficulty in bringing this case within the application of Article 219 of the Texas Code of Criminal Procedure than did this court in the cases of *ex parte* **Lange** (18 Wallace, 163), wherein it is held that the provision of the Fifth Amendment to the Constitution of the United States that no person shall be twice put in jeopardy of life or limb includes all criminal cases whether felonies or misdemeanors and whether punishable by death, confinement in the penitentiary or **pecuniary fines.** The ground upon which this Court based its interpretation of the Fifth Amendment is clearly indicated in the following extract from the opinion in that case:

> "It is very clearly the spirit of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave protection."

If the Court in this case shall look to the spirit of the law as it did in the **Lange** case, and as it did the English Courts in construing the statute of James I., it would seem that there can be no doubt that even if difficulty should be found in including this case within the literal language of Article 219 of the Texas Code of Criminal Procedure, it must be true that the case falls within the true purpose, intent and spirit of that article. We submit, however, that there can be no reasonable doubt that this case properly comes within the language of the above statute of limitation, when the same is properly interpreted.

If it be insisted that the form of a proceeding is to be held final in determining whether or not the action is subject to the bar of the statute of limitation, it would leave every defendant at the complete mercy of the prosecutor, who, by choosing the form of his action, civil or criminal, makes himself wholly master of the situation. Such a conclusion violates every sense and spirit of fairness and justice, and is contrary to every principle of equality before the law, and of uniform application of the law. Every citizen of this country, however little he may know of the intricacies of the administration of government, however little he may know of the technicalities of law, has a pretty clear conception in his mind of what is meant by

the saying "equal rights to all and special privileges to none." That phrase to him sums up his conception of justice fairly and equally administered—not according to the caprice, the good-will or prejudice of some executive officer, but according to recognized and established rules of law under which he feels himself safe in the assurance that whatever he may do to bring himself in contact with the machinery of the law, that machinery will operate against him no differently that it does against another under the same facts and circumstances.

Conceding that a large discretion is left to the legislature in classifying persons and things for the purpose of regulation and control, it is at the same time too clear for controversy that any classification so made must be reasonable and rest upon substantial differences if it would be sustained. Time and time again this tribunal has set the seal of its disapproval and condemnation upon arbitrary distinctions in legislation. Out of the many cases which may be cited in support of this proposition, we refer particularly to the case of the **G. C. & S. F. Ry. Co. v. Ellis** (165 U. S. 150), in which this Court, speaking through Mr. Justice Brewer, says:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.

Let us suppose two wrongs, each statutory offenses, *mala prohibita*, and each punishable by a pecuniary fine of, say, $100.00, imposed in the one case at the end of a prosecution criminal in form, and based upon an indictment or information. and imposed in the other case at the end of a prosecution civil in form, to recover penalties for the violation of statute. It is perfectly apparent that the object of each proceeding is precisely the same; each is designed and instituted by the government to punish a public wrong, and each falls within the class of misdemeanors. But one of these proceedings, by

reason of its form, is barred in two years, while the other, if it is contended that the statute of limitation does not apply, being an action civil in form, is never barred. Will anyone argue that this is the equal protection of the law of which we so proudly boast? If it is, then the Fourteenth Amendment is a sham and mockery, in that it sacrifices substance to form. But the Fourteenth Amendment is not a mockery for it furnishes a guarantee against just such injustice and inequality as this, and such is the meaning of Chief Justice Fuller when in *ex parte* converse (137 U. S. 624), he emphatically declared:

> "We repeat, as has so often been said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice, requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses."

In the supposititious case above, it is seen that the legislature has deemed the pecuniary fine $100.00 as an adequate penalty for the wrong done to the public. To make the injustice and inequality even more glaring, let us suppose that the statute, as it would be competent for the State to enact, should provide that the forbidden act may be punished, either through a civil suit to recover the penalty, or by a criminal prosecution, to inflict the penalty. Will anyone contend that if one person prosecuted in a criminal proceeding for such offense should be entitled to the bar of the statute of limitation of two years, and if the other prosecuted in a proceeding civil in form should not be entitled to the benefit of the same limitation, that there could be a more monstrous and shocking case of the unequal protection of the laws than this? Does it make any difference, either in principle or in substance, if the two offenses are for different acts when the legislature has decided that they are of equal gravity, that the public has been equally wronged, and that the same punishment shall be inflicted in the civil as in the criminal proceeding? The answer would seem obvious unless the guaranty of equal protection is limited solely to form and does not extend to the substance of things.

The operation of inequality in this case is to cause the infliction upon this plaintiff-in-error of a very much higher punishment than is imposed upon other persons for offenses of the same or greater gravity, though the legislature has declared that the same or a higher punishment shall not be inflicted upon the violators of other laws for each offense than is imposed for each offense in this case. In substance and in fact, a person subject to penalties at the rate of say, $200 or $5,000 per day for an unlimited period of time, is liable to much more serious punishment than is another person guilty of violating a law which denounces the same penalty, but who is not subject to prosecution for any time prior to two years before the commencement of the prosecution.

(*b.*) BAR OF STATUTE OF LIMITATION UNDER ARTICLE 3354, REVISED CIVIL STATUTES OF TEXAS.

Plaintiff-in-error further specifically excepted to the petition in this cause in so far as it was sought thereby to recover fines or penalties by reason of any act or thing alleged to have been done or committed prior to the 22nd day of September, 1904, in alleged violation of the Anti-Trust Act of May 25, 1899, for the reason that since the original petition herein was not filed until the 22nd day of September, 1906, it appears from the face of the pleadings that plaintiff's cause of action, if any it ever had, as to such fines and penalties accrued more than two years before the filing of this suit; and was, therefore, barred by the statute of limitation of two years, as prescribed in Article 3354 of the Revised Civil Statutes of the State of Texas, which this plaintiff-in-error invoked by way of exception to defeat a recovery of such fines and penalties. This exception of plaintiff-in-error was like the former one, overruled by the trial court, and such ruling sustained by the appellate court ,all over the exception and objection of this plaintiff-in-error.

Continuing our argument upon this proposition, that the denial of the application of the statutes of limitation in this case constitutes a denial of the equal protection of the laws, and by reason thereof this plaintiff-in-error is deprived of its

property without due process of law, we further point out other statutes of limitation, as provided by the Texas Legislature, in so far as the same seem to have bearing upon the facts in this case.

We contend that if plaintiff's cause of action was not barred by Article 219 of the Texas Code of Criminal Procedure, as urged above, it was barred by this section of the Texas Code, to-wit: Article 3354 of the Revised Civil Statutes of Texas.

Article 3354 of the Revised Civil Statutes of the State of Texas reads as follows:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:
>
> 1. * * * * * *.
> 2. * * * * * *.
> 3. * * * * * *.
> 4. Actions for debt where the indebtedness is not evidenced by a contract in writing.
> 5. * * * * * *.
> 6. * * * * * *.
> 7. * * * * * *."

The first question to be determined in discussing the proposition under the above quoted statute is whether the suit herein brought by the State can be regarded as an action of debt falling within the meaning and term of the above statute which provides that no action for debt shall be brought save within two years after the accrual thereof, when such indebtedness is not evidenced by a contract in writing.

The authorities upon this subject appear to be perfectly clear.

In the case of **Stockwell v. U. S.** (13 Wallace, 531), the United States brought an action of debt against Stockwell to recover double the value of certain importations of shingles, alleged to have been illegally made and received and concealed or bought by the defendant with the knowledge that the shingles had been illegally imported into the United States. There

was absolutely no contract relation between the government and the defendant, and the amount sought to be recovered was strictly, and in every sense, in the nature of a penalty. The question raised in that case was whether a civil action of debt would lie at the suit of the United States to recover the penalties incurred under the Act of Congress which defendant was charged with violating, and one of the errors assigned in this Court was, that the trial court erred in holding that such an action might be maintained. In refusing to sustain this assignment of error, this Court said:

> "The first error assigned is, that a civil action of debt will not lie at the suit of the United States to recover the forfeitures or penalties incurred under this Act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties if the defendant be the owner or importer of the goods imported, for it is conceded that, by the act of importing, an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties nor is it doubted that when a statute gives to a private person a right to recover a penalty for a violation of law, he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offense against the law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question: Who is the plaintiff? Debt lies whenever a sum certain is due to the plaintiff, a sum which can be readily reduced to a certainty—a sum requiring no future valuation to settle the amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The Act of 1823 fixed the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts which subject the proprietors to the liability is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it may be recoverable in a civil action."

In **Davidson v. Missouri Pac. Ry. Co.** (3 Willson's Cases, p. 216), plaintiff sued to recover a penalty of $500.00 against the defendant for an overcharge on freight. The Court of Civil Appeals, speaking through Judge White, reviewed the authorities on this point and announced the following result:

> "This doctrine establishes that at common law the action to recover a penalty or forfeiture is an action of debt, and the same rules and principles should be held to apply under our liberal system; and though we have abolished the common law forms of action, we may still properly call this an action of debt. We are clearly of the opinion that this is an action of debt, which debt is not evidenced by a contract in writing, and that the statute of limitation of two years is a bar to it."

In **Rockwell v. Ohio** (11 Ohio, 130), the State sued to recover a penalty from a bank cashier under a statute which prescribed that if such cashier should fail to endorse bills issued by the bank under certain circumstances, he should forfeit and pay a fine of not less than $5.00 nor more than $50.00 for each such bill refused to be endorsed by him, to be recovered before any court having jurisdiction, in the name of the State of Ohio, for the use of the person aggrieved. The action having been brought in the form of an action of debt, the objection was made that debt was not maintainable for a recovery of penalties. In overruling this contention, the Supreme Court of Ohio held that debt was the proper remedy in the case, notwithstanding even that the penalty was uncertain, to the extent that it rested in the discretion of the court to inflict a fine in any sum within the minimum of $5.00 and maximum of $50.00 for each offense.

Many additional authorities might be cited from the books and from the decisions to support the proposition that an action of debt lies for the recovery of statutory penalties, either by an individual or by the State, as the case may be, but such additional authority would seem to be wholly unnecessary in the face of the universal recognition which is accorded this rule.

Having then shown that the cause of action of the State of

Texas, if any it has, if it is of a civil nature, properly comes within the statutes above quoted, prescribing the period of two years within which actions for debt shall be commenced and prosecuted when the same do not arise out of contract, the only other question which it seems necessary to discuss is: Is this statute applicable when the State appears as plaintiff?

We recognize the fact that in the State of Texas, as in most other States, the doctrine, well-known at common law, that time does not run against the government, prevails. The question we have to face, however, is: Is this doctrine of unlimited application? That it is not, we think is clear from the following quotation from Section 97 of Buswell on Limitation:

> "The maxim '*nullum tempus occurrit regi*' is said to be founded upon the legal fiction that the king is always busied for the public good and, therefore, has no leisure to assert his right within the time limited to his subjects. The sound reason for it, however, rests in the public policy of preserving public rights, revenues and property from injury and loss by the negligence of public officials. And the prerogative right of the King of England in relation to acts of limitation is in fact nothing more than a reservation or exception introduced for the public benefit, and so exists equally in favor of all government. But independently of any doctrine founded upon the notion of prerogative, statutes of limitation are to be applied according to the established rules of construction. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed or the language of the act, that the government was intended to be included in the operation of the statute before a court of law will be authorized so to interpret it. Upon this ground it is held that the general words of a statute should not be taken to include the government or affect its rights unless such construction be indisputable."

This admirable statement of the reason upon which the doctrine is founded does not need any elaboration by way of argument, and it is only necessary that we make application of the reasons therein given to the case hereunder discussion. As shown by the learned writer of the above, the foundation

of the doctrine is the preservation of the public rights, revenue and property. It necessarily follows that if a case arises in which the exercise of the sovereignty of the State is necessary, and the State wishes to assert its prerogative in some manner purely governmental, or in which the property of the State is in controversy, or in which an officer of the State has misappropriated the funds or property of the State, and the State wishes to recover judgment for the amount, or in which there has been a trespass committed upon State property, or in which a contract has been made to pay the State money and the State seeks to enforce such contract—in any and all of these cases and cases of like character—there can be no doubt that the statute of limitation does not bar the right of the State to sue.

A number of cases have been decided by the appellate court of Texas in which those courts have held that the State is not barred. But a careful examination of these cases leads us to make the assertion that in every case in Texas in which the decision has been to this effect, the facts showed either that the State was seeking to assert its governmental power in some matter relating to its sovereignty, or was seeking to recover land belonging to it, or was seeking to recover money from some perso.. who had misappropriated its funds or was under contract obligation to pay the State. Not a single case decided in Texas can be found in which it is held that a suit for penalties for violating the law comes within the doctrine that time does not run against the State.

Referring again to the foundation upon which the doctrine rests, as announced by Mr. Buswell, it seems manifest that a suit to recover penalties for violating a statute is not embraced within the reason. When we consider the further statement above quoted that the State is not to be held included within such statutes of limitation unless it is expressly mentioned, or the mischiefs to be remedied are of such a nature that the State must necessarily be included, additional light is thrown upon the subject.

Undoubtedly, when the only interests which the State pos-

sesses is to enforce its penal laws in the light of the fact that all crimes against the State are subject to the bar of limitation except the one single crime of murder, a suit to recover penalties, though civil in form for a cause of action criminal in its character, seems clearly within the mischiefs to be remedied within the statute of limitation. This statute seems to be so entirely clear in its application to the case at bar, as not to require amplification of statement. Why the hundreds of offenses defined in the penal code, as well as a large number of offenses since created by statute, should be barred by limitation, and yet the one single offense with which this plaintiff-in-error stands charged should not be, is beyond comprehension. That offense rests upon the same basis as all other offenses, an alleged wrong done to the public, and the same reason applies to this as to all other cases. As evidence that the spirit of the maxim that time does not run against the king does not embrace penal actions, we refer to the fact that as long ago as the 31st year of Elizabeth the Parliament of Great Britain, from whose system of law we have borrowed this maxim, enacted a distinct statute, making all penal actions subject to the statute of limitation, ordinary actions being barred within two years and a *qui tam* action being barred within one year. A copy of this statute will be found in a note to the case of **State v. Moore** (19 Meigs. [Tenn.] 476). Certainly, if England three hundred and fifty years ago definitely recognized that this maxim has no application to penal actions, there can be no justification in law or in reason for the courts of this country to apply the maxim to such actions in this present day.

(*c.*) BAR OF LIMITATION UNDER ARTICLE 3358.

The above article reads as follows:

> "Every action, other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward."

As before stated, plaintiff's petition was filed September 22,

1906. To said petition plaintiff-in-error specially excepted and pleaded the above statute if the foregoing statute, to-wit: Article 3354 of the Revised Civil Statutes of Texas, and Article 219 of the Texas Code of Criminal Procedure, should be held not to apply; which said exception of plaintiff-in-error was overruled, over its exception and objection.

In spite of the fact that by the above section a period of limitation is distinctly provided for every cause of action for which some special period of limitation is **not otherwise expressly provided,** the benefit of this statute was denied plaintiff-in-error. It is not necessary to repeat the argument already made with reference to the bar of limitation being applicable to suits of this sort when brought by the State. All that we have already said upon this point applies with full force to the proposition herein submitted. As indicating the spirit in which the courts apply such statutes, the following quotation from the case of **Buswell v. Robinson** (33 N. J. Law, 273), is so strikingly in point that we include it herein as specially bearing upon our contention that the statute above quoted applies, even if no other applies. Says the Supreme Court of New Jersey, in the Buswell case:

> "Courts are very reluctant to hold a person may be subjected to a suit for a penalty for an indefinite time. Such indefinite liability is unjust and should not be so held unless the imperfections or the deficiencies of the law imperatively require it."

The broadest and most liberal construction has been given to the above Act by the courts of Texas in numerous decisions. So it has been held to apply to an action for the recision of a contract consummated by fraud (Cooper v. Lee, 75 Texas, 114; 12 S. W. 483; Evan v. Goggan, 23 S.W. 854), to a suit brought to correct a misdescription in a decree of partition (Tevis v. Armstrong, 71 Texas, 59; 9 S. W. 134), to a suit to avoid a deed for fraud, (Ry. Co. v. Titterington 84 Texas, 218; 19 S. W. 472), and in Blount v. Bleker, 35 S. W. 863 (Tex.), it was held the provisions of this article were applicable to equitable as well as legal actions for which no other provision had been made.

We submit that in view of the fact that the obvious intent of the Legislature of Texas is to provide a period of limitation for every cause of action, civil or criminal, as is indicated by the above section cited with respect to criminal actions and by Article 219 of the Code of Criminal Procedure, which provides for the limitation in bar of criminal actions in all cases except murder, that in denying this plaintiff-in-error the application of either one or the other of such statutes of limitation—in holding that no limitation exists with respect to suits of this character—but that the same may be brought at any time, even long after the defendant has ceased to do business and has perhaps entirely removed from the jurisdiction of the State (for such must be the logical result of such interpretation) this plaintiff-in-error is singled out from among all other alleged offenders and thereby is denied the equal protection of the laws.

X.

THE APPOINTMENT OF A RECEIVER AND TRANSFER TO HIM OF THE PROPERTY OF PLAINTIFF-IN-ERROR PENDING PROCEEDINGS BY WAY OF APPEAL WAS WHOLLY WITHOUT AUTHORITY AND DEPRIVED PLAINTIFF-IN-ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIED IT THE EQUAL PROTECTION OF THE LAWS.

Judgment in the trial court in this cause was rendered in favor of plaintiff, the State of Texas, on June 1st, 1907. On the same day, to-wit, June 1st, 1907, the State of Texas filed in the District Court of Travis County, Texas, an application for a receiver, which said application recited the rendition of the aforesaid judgment and alleged that a suit was then pending in the State of Missouri wherein said State of Missouri was plaintiff and this plaintiff-in-error defendant, for the purpose of forfeiting the charter of this plaintiff-in-error, and further alleging that the penalties to be recovered under the

aforesaid judgment could not be collected outside the State of Texas, and that the property of plaintiff-in-error situate in said State of Texas was inadequate to pay the judgment, and that the great bulk of said property was of a personal nature and movable and capable of being carried beyond the limits of the State of Texas, and if so removed said State of Texas would have no means of collecting the aforesaid judgment. Said application further alleged that under and by virtue of an act of the Legislature of the State of Texas, approved April 11, 1907, said State of Texas had a lien upon all of said property of plaintiff-in-error to secure payment of the aforesaid judgment; that by virtue of said judgment plaintiff-in-error had no further right to do business in the State of Texas, and that to preserve and protect the rights of the State of Texas the business of plaintiff-in-error must be conducted and carried on, at least temporarily, and be kept a going concern in said State; wherefore it was prayed in said application that the court appoint a receiver to take charge of all the property and assets belonging to said plaintiff-in-error and situate within the State of Texas and enjoin the removal of any portion of said property or assets from the State of Texas. In accordance with the prayer in the aforesaid application, the Court, on June 1, 1907, made an order granting a temporary injunction as prayed for.

To the above application plaintiff-in-error made answer filed June 10, 1907, and on the same date said Court made an order making the aforesaid temporary injunction permanent, and on June 13 appointed a receiver according to the prayer in the aforesaid application.

Plaintiff-in-error in the main case duly filed its motion for a new trial which said motion was by the Court overruled and refused by order and judgment entered on the 7th day of June, 1907, to which said plaintiff-in-error then and there, in open court, duly excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas. And on the 7th day of June, 1907, plaintiff-in-error duly filed its appeal bond for the purpose of superseding any

proceedings under the aforesaid judgment, said bond being duly executed by plaintiff-in-error, as principal and the American Surety Company of New York, as surety. Objections being raised to said appeal bond because of the fact that said surety was a foreign corporation, plaintiff-in-error, on the 15th day of June, 1907, tendered another *supersedeas* appeal bond on the main judgment, with the American Surety Company of New York and John H. Kirby, a citizen and resident of Texas, as sureties thereon.

When the above appeal bond filed by plaintiff-in-error was accepted and approved on June 15, 1907, superseding thereby the judgment recovered against plaintiff-in-error by the State of Texas on June 1, 1907, we submit that the appointment of the receiver by said court and all orders and proceedings in connnection therewith, were thereby vacated and, pending said appeal, set aside.

We further submit that it is the settled practice in the State of Texas as well as other States to look to the petition alone for all the necessary facts upon which to predicate a judgment, and that where the judgment goes beyond the petition and undertakes to decide issues which are not raised, and to make orders upon matters not alleged, the action of the court is not merely irregular, but is wholly void as being in excess of the jurisdiction of the court in the particular case.

No prayer for the appointment of a receiver appearing in the petition of the State of Texas in the original suit, we contend that, in entertaining the aforesaid application of the State of Texas and appointing a receiver thereon, the court acted wholly without its jurisdiction.

As is said by the well-known Texas authority, Judge Townes, in his work on Pleading (pp. 23 and 24), in defining the word "jurisdiction," in which he speaks of it as "potential" and "active."

> "The active jurisdiction cannot go beyond the potential and it may be much less extensive. Thus, each district court in the State of Texas has potential jurisdiction over all questions involving titles to land situated in the State, but no one of these courts can, of its own motion, deter-

> mine any abstract proposition of law affecting any such title. Its power lies in abeyance waiting action by some party in interest by which he shall invoke its exercise in his behalf. But upon such application by him, this power goes into actual operation as to the particular tract of land subject to it. If, however, the party should own another tract of land which was also being trespassed upon in the same manner as the first, invoking that jurisdiction as to the first, would in nowise affect the second; as to it, potential jurisdiction would continue to lie dormant until by some appropriate means the exercise of this power should be requested as to it."

The above rule announced is so generally recognized and accepted that citation of authorities thereon would seem superfluous, and we hardly think that it will be questioned that when the judgment in a cause goes beyond the petition and undertakes to decide issues not raised therein, plaintiff or defendant in such cause may well complain, if he is affected by such judgment, that he is deprived of his property without due process of law.

The amended petition in this cause, on which the State of Texas went to trial, was filed April 29, 1907, eighteen days after the passage of the Act of April 11, 1907, under and by virtue of which the State of Texas claims its lien and the right to have a receiver appointed. Reference to that petition will show that in no portion of it is any mention made of a lien, and the sole prayer of relief is limited to the judgment rendered in the cause, to-wit: cancelling the permit issued to this plaintiff-in-error on the 31st day of May, 1900, and an injunction restraining it from doing business in the State of Texas, and that said State have judgment for the sum of $5,239,000.00 penalties. The application for the appointment of a receiver was filed in the form of a strictly personal action after the trial of said cause and recites the judgment which was rendered against this plaintiff-in-error. We submit that under Article 1337 of the Revised Statutes of Texas which provides that "only one final judgment shall be rendered in any case except where it is otherwise specially provided by law," that it was not permissible for the State of Texas in the same cause, after fail-

ing to set up its claim to a lien upon the property of plaintiff-in-error in the petition on which it went to trial, by a new motion filed after the verdict and judgment therein, to inject this new issue into the case.

If it should be contended that when the State did not see fit to set up its lien upon the property of plaintiff-in-error it did not thereby waive its statutory lien, but would have the right in some subsequent proceeding based upon the judgment to assert such lien and ask for its foreclosure, we submit in answer to such contention that, under the settled rules of practice in the State of Texas and everywhere, it would be necessary for the State to file a new suit by petition answering all the requirements of law and brought to some subsequent regular term of court with a proper prayer or citation for foreclosure of the lien and with a proper description of the property so that the judgment affecting the same might be effective.

The cases of **May v. Taylor** (22 Tex. 348); **Bledsoe v. Wills** (22 Tex. 650); and **McConkey v. Henderson** (24 Tex. 212), conclusively settle the proposition that it is beyond the power of the court, even where a lien is set up in the pleading and the verdict of the jury does not find in favor of the lien, to cure the omission in the judgment. We submit that these decisions are conclusive in supporting our contention. For, if the verdict of a jury omitting a finding in favor of a lien expressly set up in the pleading cannot be cured by the court in its judgment, the conclusion seems irresistible that much less has the court such power when no mention of the lien is found in the pleading and equally none in the verdict of the jury.

What is then the nature and purpose of appointing a receiver in any case? Mr. Pomeroy, in his work on Equity Jurisprudence, Sec. 1330, and again in his more recent work, Equitable Remedies, Sec. 62, declares:

> "A receiver is a person standing indifferent between the parties appointed by the court as a *quasi*-officer or representative of the court, to hold, manage, control and deal with the property which is the subject matter of or involved in the controversy under the direction of the court **during the continuance of the litigation.**"

In Sec. 118 of his work on Equitable Remedies, he further declares:

> "Unless authorized by statute, there is no such thing as an action being distinctively for the mere appointment of a receiver; to justify the appointment, it is essential that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case."

Relying upon the above from this learned and acknowledged authority on Equity Jurisprudence, we submit that the appointment of a receiver is a provisional or ancillary remedy in aid of a pending suit; and, therefore, that in this case if the State of Texas thought that the appointment of a receiver was necessary to protect its claim to a lien upon the property of plaintiff-in-error, after it had failed to set up such lien and have the same adjudicated in the original suit, it was necessary to institute a new suit asking for such appropriate final relief with respect to the property, and make the application for a receiver as an incident to such suit.

Upon this point Mr. Pomeroy, in his Equitable Remedies, Sec. 71, declares:

> "The appointment of a receiver being made merely to assist in the ultimate disposition of the property in controversy, a receiver will not ordinarily be appointed unless there is a suit pending concerning the subject matter in regard to which the receiver is sought."

The only exceptions mentioned in connection with this proposition are the usual ones of receivers appointed for the estates of lunatics and infants, as authorized by the various guardianship statutes.

The instances mentioned in Sections 106 and 110 of Pomeroy's Equitable Remedies, where a receiver may be appointed to assist in the collection of a judgment will, in every case, be found to rest upon the general rule that, before a judgment creditor is permitted to resort to this form of supplemental proceeding, he must have had execution issued on his judgment and the same returned unsatisfied which, of course, presupposes the right to an execution and the failure to collect the judg-

ment through this legal process, so that these instances will furnish no support to the contention that the legislature intended to sanction the appointment of a receiver after judgment in such cases as this, and we submit that the sole basis for any such claim rests upon the lien which is attempted to be created by Section 1 of the Act of April 11, 1907. Since there is nothing in that statute **expressly providing that a receiver may be appointed after judgment has been rendered in the case** without any mention of the lien being made in the petition upon which the State goes to trial, we submit that it is a clear violation of law and of the express provisions of Article 1337 of the Revised Statutes of Texas, above referred to, to permit the application for the appointment of a receiver to be made in the same case.

It will hardly be contended that the paper filed by the State and entitled "Application for a Receiver" can be dignified by the appellation "Petition." An examination of that motion or application will disclose that it is lacking in nearly all of the essentials of a petition; that it was not intended as a new or independent suit, and that it wholly fails to contain any prayer for final relief. The whole theory upon which the paper is based is the idea that a receiver is desired as a means of aiding in the collection of a judgment, supplemented in the fourth paragraph thereof with the idea that the interests of the State require that the business of plaintiff-in-error should be conducted and carried on and kept as a going concern in the State of Texas—a most novel suggestion, unless construed to mean that the value of the property as a means of satisfying the judgment would be enhanced by selling it as a going concern.

Since the State of Texas was not entitled to the appointment of a receiver to aid in the collection of its judgment until after an execution thereon had been issued and returned unsatisfied, independent of the lien claimed upon the property of plaintiff-in-error under the Act of April 11, 1907, it would necessarily seem to follow that, treating the application as a supplementary proceeding, it was wholly insufficient to confer jurisdiction upon the court because it was filed on the same day that judgment was rendered and before any execution could issue upon the

judgment, to say nothing of the same being returned unsatisfied. Since the paper so filed was insufficiently based upon any claim of a lien on the property of plaintiff-in-error and in that it lacked the essentials of an independent suit and asked and sought for no final relief, it must necessarily follow that it was insufficient to invoke the jurisdiction of the court. We, therefore, submit that all orders made by the court based upon this application were made wholly without jurisdiction and were wholly void. And since, by reason of such orders, the property of this plaintiff-in-error was taken from it and placed in the hands of a receiver so appointed, we submit that the same constituted a violation of the Fourteenth Amendment to the United States Constitution, and that it deprived plaintiff-in-error of its property without due process of law.

As above pointed out, notice of appeal was entered on June 7, 1907, and the right of this plaintiff-in-error to file its *supersedeas* bond under the law of Texas could not expire, within the shortest period, until June 27, 1907. We submit that when the court refused to postpone action upon the application for a receiver until plaintiff-in-error should have a reasonable time in which to file its *supersedeas* bond, it was an abuse of the discretion of the court to appoint such receiver before such time had elapsed for filing an appeal bond under the law. It will not be contended that the appointment of a receiver is, as a general rule, anything other than discretionary. This discretion is not an arbitrary or absolute one, not the result of caprice or prejudice, but is to be a sound and judicial discretion. It should take into account all the circumstances of a cause and should be exercised for the sole purpose of promoting the ends of justice and protecting the rights of all the parties interested in the controversy and in the subject matter, and should be invariably based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

It may, perhaps, be contended that the appointment of a receiver in this case was an appropriate means of preventing plaintiff-in-error from continuing to carry on its business, and

to this we reply that the State of Texas did not have the power to prevent plaintiff-in-error from using its property in carrying on an interstate business, and that the judgment in this cause rendered did not and could not operate as a forfeiture or confiscation of the property of plaintiff-in-error as contraband.

In whatever light this application for the appointment of a receiver may be viewed, it seems impossible to escape the conclusion that the *supersedeas* bond in appeal in the main cause was duly filed by this plaintiff-in-error and accepted by the court; it had the effect of superseding all orders made in connection with that suit or having reference to any property involved therein, and such orders should have been immediately vacated. The effect of a *supersedeas* bond upon a judgment of dissolution as against a corporation is fully discussed in the case of **Ry. Co. v. Jackson** (85 Texas, 605), to which we invite special attention.

In concluding the argument upon the proposition that the filing and acceptance of the appeal bond in the main case superseded all further action in that case until the appeal therein was decided, we desire to call the particular attention of the court to the instructive opinion of Mr. Chief Justice Beatty in the case of **Havemeyer v. Superior Court** (84 Calif. 327; 24 Pac. 121, l. c. 134, 135). In that case a judgment of forfeiture was rendered against the American Sugar Refinery Company, a California corporation, upon conviction of having become a party to a trust, etc., and immediately after judgment entered an application was filed for appointment of a receiver under the California statute. Pending hearing upon that application, the defendant corporation filed its appeal bond in the main case; and, thereupon, contended that said appeal superseded and stayed any further action on the part of the trial court and deprived it of jurisdiction in the appointment of a receiver. This contention was overruled by the trial court and a receiver appointed who took charge of the property. The cause came before the Supreme Court of California on a writ of prohibition, and in discussing the above contention, and the effect of an appeal in the main case upon the subsequent appointment of a receiver, the court says:

"But it is held in the face of the statute (referring to the opinion of the trial court), that a stay was not possible, and this again upon the plea of necessity in order to prevent an apprehended abuse. We do not think the reason suggested is sufficient to override the law. The allowance of an appeal in such cases implies the right of the corporation to question the validity of a judgment of forfeiture until it has been affirmed here, and it is not correct to say that a stay of proceedings would operate a rehabilitation of a dissolved corporation, when the sole object of the appeal is to determine the question whether there has been a valid judgment of dissolution. But evidently the respondent was unwilling to stand upon the proposition that a stay was not possible. Waiving that and assuming that the judgment has been stayed, he concludes that the power to appoint a receiver is nevertheless suspended because the order of appointment is not embraced in the judgment, and is not a proceeding upon the judgment. It is true that the order of appointment is not embraced in the judgment, but that is not the test. An execution is not embraced in the judgment, but an appeal duly perfected stays execution. In truth, it is not correct to say that a judgment or matters embraced in a judgment are stayed by the appeal, and the statute does not say so. What it says is, that a proceeding upon the judgment and matters embraced therein are stayed by the perfecting of an appeal; that is to say, the execution—the enforcement—of the judgment is suspended. Now, here it is conceded that no receiver of the corporation could be appointed until after judgment, and that the only purpose of his appointment is to carry the judgment into effect by taking away the property of the corporation and scattering it and dividing it. How, then, is it possible that this is not a proceeding upon the judgment? According to the argument, the things to be done by the receiver constitute the only substantial and effective punishment which it is in the power of the State to inflict; the rest is a mere trifle. But it is, nevertheless, held that this ruinous penalty which follows the judgment and but for the judgment could never be inflicted, is not a proceeding upon the judgment, and, therefore, is not stayed by the appeal; and this conclusion is rested upon the authority of rulings which, it is said, have often been made by our courts. Undoubtedly it has often been held that the appointment

of a receiver is merely ancillary and undoubtedly his appointment often is merely ancillary; that is to say, he is appointed before judgment for the purpose of protecting, pending the litigation, property which is the subject of the litigation, but sometimes he is appointed after judgment for the purpose of carrying the judgment into effect, in which case his appointment and his proceedings thereunder, are not merely ancillary. In the former case his functions are not necessarily suspended during the appeal, and neither is the power of the court to remove him or control him suspended by the appeal; but in the latter case—as for instance, where a receiver has been appointed to sell mortgaged premises under a decree of foreclosure—his proceedings are suspended by the appeal. * * *

We assume for every purpose of this decision that the judgment of forfeiture in this case was not only just but legal—correct not only in substance but in form—free from error. But it does not follow that all similar cases will be equally well decided. It is possible—the constitution and the laws assume the possibility—that some case may arise in which the judgment of forfeiture will not only be erroneous, but unjust, and that it will be reversed on appeal. But the rule applied in this case must also be applied in that case. If this judgment must be executed in the manner indicated, so must that. A receiver must be appointed. He must seize all the property. He must shut up the factories, discharge the employes, prevent the fulfillment of contracts, subject the corporation to every sort of loss and damage that can be inflicted by the stoppage of a great and complicated industry, having its ramifications throughout the business centers of the entire coast; and not only this; for, if he must go to this extent—if nothing the corporation or its stockholders can do will stop him—then nothing but the forbearance of the superior judge will prevent the completion of the process. For this injury caused by an erroneous judgment, a reversal on appeal affords no redress; for no security has been given by the undertaking of a surety or otherwise to indemnify the corporation or its stockholders. The sureties of the receiver merely undertake that he will faithfully execute the orders of the court; and according to the precedent in this case they are bound in a trifling amount. If the receiver obeys orders, they are exonerated; and if his orders contemplate the infliction of punishment by the indirect

and partial destruction of property, the more completely are they exonerated, the greater the damage inflicted for which there is no redress. Unless it is to be assumed that such results as these comport with the justice and policy of a great State, the inevitable consequence of the doctrine contended for **utterly condemn it.** If, therefore, the State could demand the appointment of a receiver upon the ground and for the purposes stated, the appeal operated as a stay of such proceeding, and for that reason the appointment in this case would have been an excess of authority."

Comment upon the above would seem to be superfluous. We submit that the consequences of the doctrine invoked to sustain the appointment of a receiver in the case at bar are in and of themself sufficient to condemn the soundness of such a doctrine.

(*a.*) THE APPOINTMENT OF A RECEIVER OF PLAINTIFF-IN-ERROR'S PROPERTY FOR THE PURPOSE OF DEPRIVING IT OF THE AGENCY FOR FURTHER OR CONTINUED VIOLATION OF THE ANTI-TRUST ACTS OF TEXAS WITHOUT EVIDENCE OF SUCH INTENDED VIOLATION, AND WITHOUT EVIDENCE THAT IT COULD NOT USE ITS PROPERTY IN COMPLIANCE OF LAW, CONSTITUTES A DEPRIVATION OF SAID PROPERTY OF PLAINTIFF-IN-ERROR WITHOUT DUE PROCESS OF LAW.

On page 341 of the transcript in this cause, in the bill of exceptions of plaintiff-in-error, will be found the following, with reference to the hearing on the application of the State of Texas, for the appointment of a receiver; no evidence whatsoever was introduced, the court hearing nothing but argument of counsel:

"After reading the foregoing application, counsel for defendant (plaintiff-in-error) proceeded to argue its said general exception or demurrer to the said application for the appointment of a receiver and at the conclusion of such argument, when counsel for the state started to argue

the same, the court announced that it was unnecessary for counsel for the state to make any argument and the court thereupon proceeded to announce his conclusions with respect to said application and defendant's objections thereto, and stated that the court would take judicial notice of the proceedings in the main case and of the rendition of the judgment against the defendant (plaintiff-in-error) for violating the Anti-Trust laws of the State as charged against it in plaintiff's said second amended original petition and that it had been found guilty of violating the said Anti-Trust Laws on each and every day from the 1st day of June, 1900, to the 29th day of April, 1907, and that its permit to do further business in the state had been forfeited and cancelled by reason of said violations; and that defendant had, since May 31, 1900, been a member of an agreement which had its very existence in Texas in violation of the Civil and Criminal Laws of Texas and that it had been and still is in possession of certain instrumentalities by means of which it, in violation of the public welfare and interests, intended to continue its violation of the law pending appeal from the judgment of conviction, and that the defendant would file its proper *supersedeas* appeal bond from said judgment of conviction but that, notwithstanding defendant's right to so file said *supersedeas* bond within the time provided by law, the court was of the opinion that the legislature had provided as a remedy or means of preventing defendant from the continued violation of the law that a receiver should be appointed to take charge of its property and business and deprive it of the instrumentalities by which it had so violated the law and **would continue to violate the law; and because of such statute and the declared purpose of defendant (plaintiff-in-error), speaking through its general counsel, John D. Johnson, in newspaper interviews which had been brought to the attention of the court, in which said Johnson had discussed the effect of the aforesaid judgment of conviction against defendant (plaintiff-in-error) and had declared the purpose of defendant to appeal from said judgment of conviction and to continue to carry on its business in the same manner it had heretofore done, notwithstanding such judgment of conviction.** And without any **evidence** being submitted to the court in connection with said application, the court thereupon announced that it would grant the said application and appoint a receiver as therein prayed for."

We submit that the action of the court as above set forth is so wholly arbitrary and without foundation in any principle of law or justice that it cannot be treated in any sense as a judicial determination of the right of this plaintiff-in-error, and that it is not entitled to respect in any tribunal. It is difficult to speak with moderation of a decree rendered as this one was; we submit that it was a mere arbitrary edict clothed in the form of a judicial sentence.

Says this Court in **Windsor v. McVeigh,** 93 U. S. 274, speaking through Mr. Justice Field:

> "The doctrine invoked by counsel that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause and its judgment, however erroneous, cannot be collaterally assailed is undoubtedly correct as a general proposition, but like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular causes of actions such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular processes in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its mode of procedure and in the extent and character of its judgments. **It must act judiciously in all things and cannot then transcend the power conferred by law.** If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void, because the court in rendering them would trans-

cend the limits of authority in those cases. See the language of Mr. Justice Miller to the same purport in the case of *ex parte* **Lange,** 18 Wallace, 163. So it was held by this court, in Bigelow v. Forrest, 9 Wallace, 351, that a judgment in a confiscation case condemning the fee of the property was void for the remainder after the termination of the life estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the Court replied:

'Doubtless a decree of a court having jurisdiction to make the decree cannot be impeached collaterally but under the Act of Congress, the District Court had no power to order a sale which would confer upon the purchaser rights outlasting the life of French Forrest, (the owner). Had it done so, it would have transcended its jurisdiction.'

So a departure from the established modes of procedure will often render the judgment void, thus the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the chancellor, and the reason is that courts are not authorized to exert their power in that way.

The doctrine invoked by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause **according to the established modes governing the class to which the case belongs** and does not transcend in the extent or character of its judgment the law which is applicable to it."

In **Hovey v. Elliott** (167 U. S. 409), this Court, in discussing the power of a court to punish for contempt, when the defendant is given no opportunity to be heard in his own behalf, speaking through Mr. Justice White, says:

"The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action **and to render decrees without any hearing whatever** is in the nature of things to convert the court exercising such an authority into an instrument of wrong and oppression

and, hence, to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

We have no desire to argue to any great extent the proposition above laid down, deeming it unnecessary in the light of the authorities above quoted to say anything more than is contained in that portion of the bill of exceptions above quoted, describing the action of the court in the appointment of this receiver. Not one solitary bit of evidence was adduced tending even remotely to show that this plaintiff-in-error intended to violate the Anti-Trust Laws of the State of Texas in any way, shape or form, pending its appeal upon the judgment rendered against it; not a single bit of evidence was offered to show that the property of this plaintiff-in-error could not be used in the State of Texas, except in violation of such Anti-Trust Acts, nothing but the unsupported declaration—if it may be dignified by such a name—of a newspaper alleging that the general counsel of this plaintiff-in-error had declared that the company would continue business in the same way, was before the court and upon this it based its order. If this be equity, we submit that it is equity of a sort wholly new and strange. If this be due process of law, then is the Fourteenth Amendment a hollow mockery and a sham.

XI.

THE TEXAS ACT OF APRIL 11, 1907, IS NULL AND VOID.

1. IN SO FAR AS IT ATTEMPTS TO CREATE A LIEN UPON THE PROPERTY OF PLAINTIFF-IN-ERROR FOR ACTS COMMITTED BEFORE SAID ACT TOOK EFFECT.

2. IN SO FAR AS UNDER IT THE RIGHT TO APPOINT A RECEIVER IS LIMITED TO SUITS AGAINST CORPORATIONS ONLY.

3. IN SO FAR AS IT ATTEMPTS TO CREATE A LIEN UPON THE PROPERTY OF PLAINTIFF-IN-ERROR,

SAID LIEN BEING CREATED, NOT BY THE TERMS OF THE ACT BASED ALONE UPON THE COMMISSION OF THE OFFENSE BUT BEING LEFT TO BE CREATED BY THE ACTION OF THE PROSECUTING OFFICER IN FILING SUIT TO RECOVER PRESCRIBED PENALTIES— THE SAME BEING THEREBY AN UNWARRANTED DELEGATION OF LEGISLATIVE POWER TO AN EXECUTIVE OFFICER.

In so far as it is sought to apply the terms of the Act of April 11, 1907, to this cause and by virtue thereof to assert and enforce a lien upon the property of this plaintiff-in-error, we submit that the Act is within the prohibition of Section 10 of Article 1 of the Constitution of the United States which expressly denies to any state the right to pass an *ex post facto* law. We submit that the act is not only retrospective and retroactive in its operation in so far as it seeks to authorize the appointment of a receiver to take charge and possession of the property of this plaintiff-in-error in aid of the judgment rendered against it in the trial of this cause, but that it has the express effect of inflicting an additional punishment upon this plaintiff-in-error and of increasing the penalties prescribed under the previous laws to-wit, the Anti-Trust Acts of 1899 and 1903, and that for this reason said act, in so far as it applies to this suit, is wholly unconstitutional and void. We further submit that said Act of April 11, 1907, under which the court acted in appointing said receiver is unconstitutional and void in so far as it authorizes the appointment of a receiver in a suit brought to recover a personal judgment in which no lien upon the property of the defendant in that suit (plaintiff-in-error herein) was ever asserted or adjudicated, and the action of the court in the appointment of a receiver in such cause was consequently within the prohibition of Section 1 of the Fourteenth Amendment to the Constitution of the United States which denies the right of any state to deprive a person of property without due process of law, and further prohibits the state from denying a person the equal protection of the laws.

We submit further, that the said Act of April 11, 1903, is in

violation of Section 1 of the Fourteenth Amendment to the United States Constitution, in that it confers a special privilege upon the State, as a litigant in its own courts, in the matter of collecting a personal juudgment recovered by the State, and thereby denies to this plaintiff-in-error the equal protection of the law, the necessary result of which is to deprive plaintiff-in-error of its property without due process of law.

The original suit of the State of Texas against this plaintiff-in-error was filed September 22, 1906. The Act above referred to and by virtue of which the receiver was appointed, was passed and went into effect April 11, 1907.

It would seem unnecessary to repeat or make special reference to the argument and authorities heretofore submitted to the court, in connection with other assignments of error, in support of the proposition that the Anti-Trust Acts of 1899 and 1903, for the alleged violation of which this plaintiff-in-error stands convicted, were statutes which undertook to define offenses and to prescribe punishments for purely public wrongs. We consequently assume that it will not be denied that this is essentially a prosecution for the enforcement of the penal laws of the State of Texas; and we, therefore, insist that every principle of law which enters into the definition or punishment of crime, every presumption in favor of a defendant charged with crime, in short, every rule of the criminal law designed to protect a defendant from arbitrary and unwarranted deprivation of life, liberty or property must he held to apply to this proceeding. We, therefore, invoke the express protection of the *ex post facto* clause of the Federal Constitution with respect to any act of the courts of Texas by virtue of which this plaintiff-in-error is made amenable to the Act of April 11, 1907.

In view of the fact that neither the Anti-Trust Acts nor other laws of the State of Texas prior to the passage of the Act of April 11, 1907, either provided for or authorized the appointment of a receiver for the property of any person standing charged with the commission of a penal offense, and especially of a corporation charged with violating either or both of these Anti-Trust Acts; that no statute existed by virtue of which a

lien was created upon the property of such person or corporation as an incident to the alleged violation of any law, or as an incident to the institution of any suit to enforce the law or to punish for an infringement thereof—in the light of these facts, we submit most earnestly that the creation of such lien and the appointment of a receiver increases the punishment of an alleged past offense and that the application of the act, therefore, to this cause, results in making this plaintiff-in-error amenable to an act distinctly *ex post facto*, thereby invading and infringing its constitutional rights.

We do not wish to burden the court with any lengthy citation of authorities or argument upon the interpretation of the *ex post facto* clause of the Federal Constitution, and we shall endeavor to confine our authorities and argument essentially to the point here under discussion.

The interpretation of the *ex post facto* clause in the Federal Constitution, as given in **Calder v. Bull** (3 Dallas, 388), has never been qualified, and we submit that the two features of lien and receivership, provided for by the Act of April 11, 1907, are essentially an increase of the penalties provided for in the Anti-Trust Acts of 1899 and 1903, and in consequence clearly fall within the second and third definition of an *ex post facto* law as laid down in **Calder v. Bull**:

> "An *ex post facto* law is one which aggravates the crime, makes it greater than when it was committed, changes the punishment and inflicts greater punishment than the law annexed to the crime when committed."

In the later and leading case of **Cummings v. Missouri** (71 U. S. 277), this provision of the Federal Constitution again came up before this court and was fully and carefully discussed. From the opinion in that case, we desire to make the following extracts as bearing directly upon our arguments herein. After referring to the period of excitement which existed in the State of Missouri during and immediately following the close of the Civil War, when the Missouri Constitution was adopted, the provisions whereof were then before this court for consideration, the court uses this language:

"It was against the excited action of the states under such influences as these that the framers of the Federal Constitution intended to guard. In **Fletcher v. Peck** (6 Cranch, 137), Chief Justice Marshall, speaking of such action uses this language:

'Whatever respect might have been felt for the State sovereignty, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States in adopting that instrument, have manifested a determination to shield themselves and their property from the effect of those sudden and strong passions to which men are exposed. The restrictions on the legislative powers of the State are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each State.

* * * * * * * * * * *

The constitution (continues the court in discussing Cummings v. Missouri), deals with substance, not shadows. Its inhibition is levelled at the thing, not the name; it intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

The language of the learned court in the above case, the facts under which that case arose and was presented to this Court, bear a very strong and striking analogy to the case at bar. With all due respect and with no design to introduce into this argument anything not shown by the record, we submit that in view of the well-known fact that prior to and during the time that this case was on trial in the courts of Texas, that State and its people were in the midst of an agitation directed at practically everything bearing the name of "corporation" and especially of "trust," and that the excited passions of the people of the State—whether right or wrong, is not for us to say—were levelled particularly at the Standard Oil Company and any person or corporation connected therewith. It is a fact as shown by the record, that in the midst of all this excite-

ment and feeling between the time when this suit was begun against this plaintiff-in-error in the courts of the State of Texas, a suit based almost entirely upon the charge that a union or combination existed between plaintiff-in-error and the aforesaid Standard Oil Company, at the time when nearly every newspaper in said State was spreading broadcast among the people the assertion that the said Standard Oil Company owned a majority of the stock of this plaintiff-in-error, at a time when the State of Texas was divided into two great opposing camps over a contest respecting the election of a United States Senator and in which contest this suit and the allegations of the State in its petition therein played a prominent role—during this time and before this suit had been concluded in the trial court, and while the same was pending—the legislature of the State of Texas met and passed the Act of April 11, 1907. In the light of these facts we contend that the language of the Supreme Court of the United States in the great case of Cummings v. Missouri, is particularly applicable to the case at bar, and that the sentiment which moved the court in that case, under the facts presented to it, to seek even jealously to protect the rights of the citizen when the same appeared to have been infringed under the stress of undue excitement, must equally animate this Court in reviewing this case, and especially in passing upon the validity of this act.

We come now to a consideration of the second clause of what Mr. Justice Marshall terms a bill of rights for the people of each State. The clause which prohibits the passage of an *ex post facto* law. By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that which was prescribed at the time of the commission of the act; or changes the rules of evidence by which less or different testimony is made sufficient to convict than was required at the time of the commission of the act. We hardly think that it will be contended that the foregoing is anything but a fair statement of the meaning of the term *ex post facto* law, as the same has been interpreted in the many cases both

State and Federal, in which its meaning has been the subject of consideration.

In **Fletcher v. Peck** (6 Cranch, 137), Chief Justice Marshall defines an *ex post facto* law to be one:

> "which renders an act punishable in a manner in which it was not punishable when it was committed."

"Such a law," says this eminent jurist, "may inflict penalties upon the person or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by **which a man's estate or any part of it shall be seized for a crime which was not declared by some previous law to render him liable to that punishment."**

This case of **Fletcher v. Peck** furnishes a striking example of the fluctuation of public sentiment. In that case the people of the South found in the Constitution of the United States, in the limitations therein imposed upon the powers of the separate States, a protection against oppressive and unjust laws, even as in Cummings v. Missouri that same Constitution was invoked to protect against the hasty and unwise and oppressive act of a State in the excitement following the close of the Civil War. It must seem strange, then, especially to this court, to find the same people who invoked the federal protection against *ex post facto* laws in Fletcher v. Peck, protesting against the application of the very principles in that case invoked when they are applied to the hasty, ill-considered and prejudiced legislation of these modern times, when such legislation is challenged because in violation of the fundamental principles under which this government was organized, and which, time without number, have been fully declared in the decisions of the Supreme Court of the United States, prior even to the admission of the State of Texas into the Federal Union. We are urged to make this observation in view of the contention strenuously made by the State in the hearing of this cause below that, since the year 1889, the State of Texas had been enacting laws on the subject of trusts, making each act an enlargement of its predecessor and all evidencing a fixed and continued purpose to control corporations within the State.

We have no desire nor are we called upon to question the power of the legislature of any State to pass laws for the suppression of trusts and combinations, and for the regulation of corporations in order to prevent such evils, but we do contend that all such laws, no matter how salutary and good their purpose may be, must conform to fixed and settled constitutional rules and principles. With reference to the particular act here under consideration, we submit that, under its terms and in the effect which has been given to it in this case, it clearly violates the long settled constitutional provision against the enactment of an *ex post facto* law. And we further deny the right of the State of Texas by this act to create a lien upon the property of plaintiff-in-error for past offenses or to base the right to appoint a receiver upon the assertion of any such lien. In this, as well as in the act of the court authorizing the seizure of this plaintiff-in-error's property through actual appointment of a receiver, we submit that the provision of the Federal Constitution has been distinctly violated, and this plaintiff-in-error has thereby been unconstitutionally deprived of its property without due process of law.

To illustrate further the application of this law, let us assume that three persons compose a firm and are operating in the oil business in the State of Texas and that three other persons have formed a corporation and are engaged in the same business, and that this firm and this corporation enter into a combination in violation of the anti-trust laws of the State of Texas. Reference to the act in question will show conclusively that the co-partnership does not fall within the terms of the act, but that the corporation does; that a lien may be asserted upon the property of the latter, dating from the institution of the suit against it and a receiver appointed of its property to enable the State to collect the penalties imposed against it, while such a proceeding is wholly without law or authority in the case of the co-partnership. Reference to the act of April 11, 1907, would show that this illustration is correct since nothing in the act refers to anything except "foreign or domestic corporations." The act itself is entitled:

"An act relating to fines, penalties and forfeitures due or to become due to the State of Texas by **foreign or domestic corporations** to provide for the securing and enforcement of payment thereof; to fix liens upon the property of **such corporations** to secure payment thereof; to provide for the survival of actions and causes of action in cases of a **dissolution or forfeiture of charters or cancellation of permits of such corporations**; to provide for the appointment of receivers, fixing venues, providing that this act shall be cumulative of all other laws in force in this State and declaring an emergency."

Elsewhere in this brief (appendix), will be found the full text of the act. We quote the title as above merely to support our contention that the act relates only to corporations and that it distinctly provides for the creation of a lien upon the property of corporations, and corporations only.

The proposition that the seizure of the property of this plaintiff-in-error or the encumbering it with a lien according to the terms of the act of April 11, 1907, does add and add substantially to the punishment provided for the violation of the Anti-Trust Acts of 1899 and 1903, and changes the law providing for such punishment as the same existed at the time of the commission of the acts, which it is alleged constituted an offense—this proposition would seem to be almost too self-evident to require elaboration by way of argument or authority.

Remembering that under the terms of the act under discussion the lien therein asserted is for all practical purposes created at a moment when a suit is filed against a defendant corporation by the State whether the State succeeds in the suit or not, let us examine for a moment the evil effects which will of necessity follow the creation of such a lien in support of our contention that such lien is an additional punishment as against this plaintiff-in-error.

Let us suppose that in this case the courts of the State of Texas had limited the right of the State to recover penalties to a period of two years at $50.00 per day—under a decision that plaintiff-in-error was not amenable to the act of 1899 on ac-

count of the bar of the statute of limitations, thereby reducing the maximum which the State could possibly recover to $36,500.00. Now the suit filed against plaintiff-in-error, as the petition therein was originally framed, called for the infliction of penalties aggregating more than $5,000,000.00. In the light of this, can anyone doubt that by the act of filing the suit the credit of this plaintiff-in-error as a merchant—for strictly speaking that is what he was—would be seriously injured and impaired, if not wholly destroyed, since the act of filing the suit against it created this enormous lien upon all its property then or thereafter brought into the State of Texas.

We submit that it is elementary law that a statute which subjects, in criminal prosecutions, for the same offense, one person to a greater or a different punishment than others, or punishes one and not the other, is in violation of the provision in the United States Constitution which prohibits any State from denying to any person within its jurisdiction the equal protection of the law. (**Pace v. Alabama,** 106 U. S. 585; **Niagara Fire Insurance Co. v. Cornell,** 110 Fed. Rep. 817.)

In this connection, we desire also to submit that, under the rule of strict construction of penal statutes and remembering that the Anti-Trust Acts under which it is sought to punish this plaintiff-in-error are penal, the encumbering of its property by a lien with all the incidents attaching to such encumbrance by way of impairment and destruction of its credit and inability to convey its property freely can be treated as nothing else than the punishment of this plaintiff-in-error **before it has been found guilty** of any offense. This feature of the case appears so obvious to us that it would seem to require but little discussion. The principle which may be invoked as against this proposition by analogy from the rule of *lis pendens* or the statutory lien which may arise in the bringing of civil suits can have no application here, for, as we have constantly shown, this is a penal action, a suit for the recovery of a penalty, a suit brought to protect a public right

and to redress a public wrong, and whatever be its form, we insist that the defendant therein is entitled to all the protection established by the rules of criminal law? In view of this, we earnestly contend that any law or the action of any court which deprives the defendant in a criminal suit of his property or his liberty before the suit results in a verdict of guilty against him, and a judgment properly entered thereon, is such a glaring violation of due process of law, of the law of the land, which hears before it condemns and punishes, that this alone would be sufficient to justify any court in declaring this act wholly unconstitutional and void. We admit that it is a well-known principle in criminal law and a practice constantly followed to deprive a person of his liberty even before judgment of guilt, and this, perhaps, too, might be extended to a sequestration of his property—but alone and for the express purpose of compelling his appearance in the trial of the cause. No such purpose as this is expressed in the act in question.

In that the appointment of the receiver under the order of the court actually takes the property of plaintiff-in-error from its management and control, we submit that not only is it deprived of the value residing in the use of that property while in the hands of the receiver but that the damage which must necessarily follow to an established business—a business more or less technical in its character, requiring expert and skilled and experienced management, by placing it in the hands of a receiver who cannot be presumed to possess the necessary skill and ability to manage such business in the manner in which its owners managed it—we submit that this is sufficient to show that the punishment of this plaintiff-in-error is materially and substantially increased. In this connection it must also be remembered with respect to the appointment of such receiver that when such receiver is appointed at the suit of the state, and takes charge of the property, administers and manages it as best he can pending the litigation, and then defendant is finally acquitted of the charge presented against it in such suit, even though defendant's business which is now returned

to it by the receiver in charge may be found seriously impaired—if not wholly destroyed—no adequate remedy exists to recover any loss so suffered, as against the state.

The suggestion that the appointment of a receiver is an additional remedy for the suppression of trusts and may be therefore justified upon the ground that with respect to "remedies," the provisions of the Federal Constitution prohibiting *ex post facto* laws do not apply, fails to take into account the elementary rule that it is the substance of the act and not the name which must control and that what cannot be done directly cannot be done indirectly. If this act is treated as purely a remedial measure so far as its form is concerned this court can not close its eyes to the effect which this so called remedial statute must produce upon the property of plaintiff-in-error. The above contention is adequately and strongly answered in the opinion of this court in **Cummings v. Missouri.**

> "The Constitution deals with substances, not shadows. Its inhibition is levelled at the thing, not the name. It is intended that the rights of the citizen should be secured against deprivation for past conduct by legislative action under any form, however disguised. If the inhibition can be avoided by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

In concluding this branch of our argument, we cannot refrain from saying one word more upon the proposition that in a civil action for the enforcement of a penalty the principle for which we are contending should be applied and to refer in connection therewith to the case of **Wilson v. O. & M. R. R. Co.** (64 Ill., 542; 16 Am. Rep., 565). In that case the statute imposed a penalty of $50.00 for certain offenses. A subsequent act amended the former so as to authorize a penalty not exceeding $100.00 and contained a proviso that the second act should not apply to proceedings pending under the first act, except so far as to change the amount of the penalty. It was held that the first act was repealed by the second but that the proviso of the latter was unconstitutional as an *ex post facto* law and that therefore the prosecutions pending under the first act were defeated by the passage of the second.

The case of **Havemeyer v. Superior Court,** (84 California 327; 24 Pac. 121), which we have fully discussed above, is in many respects decisive of the propositions raised here with respect to the illegality of the appointment of a receiver. The Havemeyer case furnishes an exceptionally strong analogy in that the corporation, defendant in that case, and against whom judgment of forefeiture was rendered (upon the strength of which judgment the receiver was appointed) was a corporation of the State of California, and consequently no question could arise as to the authority of the state court in pronouncing a decree of dissolution. In denying the right of the trial court to appoint a receiver of the property of the corporation after judgment of forfeiture entered against it and holding that the power of the trial court with respect to the property of the corporation wholly ceased when the defendant in the original suit filed its appeal bond from the judgment of forfeiture, the Supreme Court of California in its learned and comprehensive opinion, speaking through Mr. Chief Justice Beatty, says, with reference to the contention that the appointment of the receiver in such case is an additional punishment:

> "He (referring to the opinion of the trial judge) asks if it is possible that this controversy between the state and a concern with millions of capital is limited to the imposition of a fine of $5,000.00 and the cancellation of a charter, the duplicate of which can be obtained while we are talking here; and he answers his own question as follows: 'I understand the great interest of the state is to break down the monopoly. To do that it seizes the means and utensils—the business— with which the monopoly has been proceeding; it scatters it; it divides it up; a receiver is appointed for that purpose; that is a part of the penalty; that is a part of the penalty provided by law, because they have forfeited their corporate rights—no other reason.' Translated into terms specifically applicable to the case before us, the meaning of this is that if a corporation, organized for the purpose of refining sugar, enters into a combination with other corporations through the medium of what is called a 'trust' for the purpose of limiting the production and keeping up the price of refined sugar, the courts will not only forfeit its charter and impose the ut-

most fine which the law prescribes for such offenses but they must go further and by the hands of a receiver seize into their possession all the property of the defunct corporation and especially a sugar refining plant, not for the purpose of preserving and protecting it and as speedily and economically as possible distributing it to those who are equitably entitled, viz: creditors and stockholders, but for the quite opposite purpose of shutting up and condemning it to rust and idleness until such time as it can be unfitted completely for the purpose to which it is best adapted by dividing it up and scattering it. We confess that this is to us a novel doctrine and one which does not upon any ground commend itself to our judgment. It may not be the rule in this state to construe penal legislation strictly, but even here when a court is asked to impose a penalty for infliction of a law the first inquiry is: What penalty does the law prescribe? The answer to this question is sought, not in labored construction of other statutes but in the express terms of the act defining the offense."

The above is but a small portion of a lengthy opinion of the court all of which is based upon the proposition that the appointment of the receiver to take charge of the property of a corporation **whose dissolution has even been decreed,** to say nothing of merely fining it and ousting it from the state, is distinctly and in every sense the imposition of a penalty.

We come now to the consideration of the proposition that the Texas Act of April 11th, 1907, in so far as under it the right to appoint a receiver is limited exclusively to suits against corporations, is unconstitutional and void in that it provides different penalties for the same offense when committed by different defendants and thereby is a denial of the equal portection of the laws. We submit that this element of the act in question constitutes an arbitrary and unwarranted differentiation between persons and imposes burdens upon one class where none are imposed upon another for doing precisely the same act in violation of the same law. Elsewhere in this argument we have pointed out that under the act a combination entered into between a co-partnership and a corporation, making both parties liable to the penalties under the Anti-Trust Act would,

in the case of the corporation, subject it to the provisions of the Act of April 11th, 1907, and authorize the appointment of a receiver of its property pending an appeal; but not so in the case of the partnership equally guilty with the corporation. In the one case the lien is created upon the property of the corporation, a cloud upon the title to its property is created from the time the suit is filed but none of these burdens fall upon the co-partnership. We utterly fail to see that the fact that one is a corporation and the other is not, makes any substantial difference and we submit that any classification of this character, if indeed the legislature intended to make a classification, is wholly capricious and unwarranted by every rule of law. In this case we have a foreign corporation which as a matter of fact cannot be dissolved by the decree of any court of Texas, and which, even if its permit to do business in the state is canceled, still remains the owner of its property, and is still vested with all the right to carry on an interstate business or sell its property. That the creation of a lien or, perhaps more properly speaking, the claim of a lien, arising from filing suit against such firm corporation must constitute a serious impairment and a substantial injury to its ownership of its property cannot be questioned. And yet under the act under discussion the individual or the co-partnership is relieved from this burden and the corporation is made to bear it.

If the lien herein asserted were made to spring from the judgment of conviction it might well be claimed that the individual would stand bound for all of his property for its satisfaction while only the property of a corporation as such could be reached. But that is not the case here. The result here is to cloud the title to the property of the corporation even long before it is found guilty, to embarrass it in the conduct of its affairs and disable it in carrying on its business, to prevent it from creating liens upon its property for needed extensions, improvements and repairs and from borrowing money on its general credit or buy goods in the usual course of its business, because under this law all the property which the corporation has in the state

or all the property which it may bring within the state after the suit against it is filed is impressed with this lien which takes into no account the right of the corporation to sell goods and pass the title thereto to the purchaser in due course of trade—the result of all this can be none other than the destruction of the business of the corporation from the moment the suit is filed, when the individual or the co-partnership who may be joint offenders with it and who may be equally sued as such are left free to continue their business unembarrassed and unhindered by such an encumbrance. We submit that such a law presents such a glaring inequality, one so patent and so far reaching in its unjust effect, that it requires no argument to show that it is a plain violation of the principle of the equal protection of the laws.

We assume in this connection that it will not be contended that a foreign corporation doing business within a state is not entitled to the protection of the Federal Constitution as herein invoked in the same degree as any person or domestic corporation.

We have already pointed out in connection with the discussion of the effect of the appeal in the main case herein in staying further proceedings by way of the appointment of a receiver, that the application of such law to a corporation chartered under the laws of the state, whose chartered existence could be destroyed by the court was illegal, and void in that such a law was a denial of the equal protection of the law, and that in such cases it had been uniformly held that an appeal from the judgment of dissolution under a *supersedeas* bond has the effect of holding the judgment in abeyance and continuing the corporation as a living entity until such judgment is affirmed. Such was the distinct holding of the court in the Havemeyer Case, *supra*, and such was the distinct holding of the court in Jackson v. Trunk Railway Company, 85 Texas, 605.

If the authorities are correct, the only other means of escaping the conclusion that such law is invalid is to insist that this statute cannot be applied to state corporations but is limited in its application solely to foreign corporations.

With respect to the question of classificaation herein involved, we respectfully refer the court to the learned opinion of Mr. Justice Brewer in the case of the **G. C. & S. F. R. R. Co. v. Ellis,** 165 U. S. 150; 41 L. ed. 666. We might well be justified in quoting the entire opinion in that case since almost every word said therein has a distinct bearing upon the case at bar. We content ourselves merely with saying that in that case this Court distinctly held that corporations are persons within the provisions of the 14th Amendment and that a state has no more power to deny to them the equal protection of the law than it has to individual citizens. The state statute under examination in that case provided for the imposition of an attorney's fee not to exceed $10.00, in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation. This court finding that the act applied to no other corporations and to no individuals declared it unconstitutional as denying the railway companies the equal protection of the laws. And in discussing the question of classification therein raised, Mr. Justice Brewer declared that a classification, to relieve a statute from the charge of a denial of the equal protection of the law, must be one which is not made arbitrarily, but must be based upon some defense which in all circumstances bears a just and proper relation to the attempted classification. We take the liberty of inviting the particular attention of the Court to this case.

In concluding our argument on this point we submit that if the act in question contained no other phase, than the one herein pointed out, this alone is enough to condemn it. And when consideration is taken of the serious and far-reaching effect produced upon the business and property of this plaintiff-in-error by the application of a right based upon this statute, the viciousness of the act must seem even more apparent.

We further submit that the Act of April 11, 1907, is unconstitutional and void and in violation of Section 1 of the 14th Amendment to the Federal Constitution in that it does not pro-

vide for a fixed and uniform rule of law applicable to all persons alike, but is a delegation of the legislative power to an officer of the executive department to create or not to create a lien as in his wisdom he may see fit and thereby to discriminate between persons at will. Section 1 of the Act in question declares.

> "That the State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General or District or county attorney acting under his direction, in any court of competent jurisdiction within this state for the purpose of forfeiting the charter or cancelling the permit of such corporations or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture shall constitute notice of such lien."

The above language can admit of but one construction, to-wit, that under and by virtue of it the Attorney-General of the state has it within its power at all times to encumber the property of any corporation by filing a suit against it either to forfeit its charter or cancel its permit or merely to recover penalties, or both, whether such suit be founded upon facts which he may reasonably believe constitute a sufficient cause of action or not. If it be contended in answer to this that it must be presumed that the Attorney-General of the state will exercise the duties of his office lawfully and without prejudice, etc., we nevertheless submit that this is an unwarranted delegation of legislative power, and that even though it is admitted that the Attorney-General will act in good faith the "law of the land" does not contemplate that the property of a corporation shall be at all times subject to the imposition of a lien whether arbitrarily or mistakenly created without at least some redress to the corporation for damages which it may suffer thereby.

In the case of the **Mayor of Baltimore v. Radecke** (49 Md., 217; 33 Am. Rep., 239), a city ordinance prohibited any person from putting up a stationary steam engine without the consent of the mayor and council and provided for the revocation of such permit, and to compel the removal of such engines on

six months' notice; it was held unreasonable and void in that it was an improper delegation of legislative authority. In commenting upon the power thus delegated to the mayor, the Supreme Court of Maryland says:

> "But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the City of Baltimore to cease to do so. And by providing compulsory fines for every days' disobedience of such notice and order of removal renders his power over the use of steam in that city practically absolute so that he may prohibit its use altogether, but if he should not choose to do this but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured or partiality and oppression prevented. It is clear that giving and enforcing these notices may and quite likely will bring ruin to the business of those against whom they are directed. While others from whom they are withheld may be actually benefited by what is thus done to their neighbors. **And when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed,** it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

We have quoted the above not only for the purpose of showing the effect of the delegation of such power to an executive officer but even more for the purpose of showing that the courts will not hesitate to take into consideration the evil effects which may be produced by the arbitrary exercise of such power, even in the face of a presumption that public officers will execute the duties of their office *bona fide* and without prejudice.

The cases might be multiplied in which ordinances and statutes of this character have been held null and void, not only

upon the ground that they denied the equal protection of the laws, but that they were unreasonable and arbitrary and in violation of the principle that legislative power cannot be delegated to either department of the government. As was said by this court in the leading case of **Yick Wo. v. Hopkins** (118 U. S. 366):

> "The guaranty of equal protection of the laws is a **pledge of the protection of equal laws.**"

In **Barbier v. Connolly,** (113 U. S. 27), this court in construing this provision of the Fourteenth Amendment declared that

> "It was undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and to acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property or prevention and redress of wrong and the enforcement of contracts, **that no impediment should be imposed upon the pursuits of anyone except as applied to the same pursuits of others under like circumstances; and that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.**"

In concluding this brief and argument, we cannot refrain, in the light of all the facts in this case as exhibited by the record, to invite the attention and thoughtful consideration of the court to the words of Mr. Justice Matthews, speaking for this court in **Yick Wo. v. Hopkins,** (118 U. S. 356):

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

The above words seem, to us at least, to have a particular signification when applied to this case. The first official act of this nation proclaimed the theory upon which all government

is founded in words which have ever since been the star of hope to other nations of the world:

> "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable rights; among these are life, liberty and the pursuit of happiness."

While it may be true, as has been said by this Court on several occasions, that this Declaration, the fundamental principles, therein contained, may not have all the force of organic law or be made the basis of judicial decisions as to the limitations to be imposed upon rights and duties, we must not forget that in this Declaration rests the spirit of the organic law of this nation and the letter of the Constitution must always be construed in the spirit of the Declaration of Independence. That duty rests imperatively and unceasingly upon the Federal Courts of this land, and more especially upon this court.

We have endeavored in this argument, oft-times at the cost of no little self-restraint, to be temperate in our language and whenever we have attacked the laws of the State of Texas and their application to plaintiff-in-error herein, we have endeavored to do so, constantly remembering the position to which defendant-in-error, in this case, is entitled by reason of the fact that it is one of the States of this Union. But with all due deference to the dignity and position occupied by defendant-in-error, we assert, that in our opinion, few cases have ever been presented to this Court exhibiting such a glaring denial of constitutional rights as is presented by the case at bar. If the theological doctrine of vicarious punishment has become a principle of our law, then, indeed, is the judgment below correct and should be sustained. But if this doctrine does not find place in our law, then are the proceedings and the judgment below worthy of naught but condemnation.

Respectfully submitted.

H. S. PRIEST,
of Counsel.

APPENDIX.

ACT OF APRIL 11, 1903.

An act relating to fines, penalties and forfeitures due or to become due to the State of Texas by foreign or domestic corporations; to provide for the securing and enforcement of payment thereof; to fix liens upon the property of such corporation to secure payment thereof; to provide for the survival of actions, and causes of action in case of the dissolution or forfeiture of charters or cancellations of permits of such corporations; to provide for the appointment of receivers, fixing venue, providing that this act shall be cumulative of all other laws in force in this State, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, including any law against trusts, monopolies and conspiracies, or combinations, or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within the State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and all costs of suit and of collection, and the State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General or District or County Attorney acting under his direction in any court of competent jurisdiction within this State for the purpose of forfeiting the charter or canceling the permit of such corporations, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture shall constitute notice of such lien. Where any such law has heretofore been violated, or shall be violated before the taking effect of this act, and a cause of action exists for such fine, penalties or forfeiture, or shall come into existence before the taking effect of this act, and suit

shall be filed in such case, the State shall have a lien to secure the payment of such fine, penalties and costs from the time this act shall take effect on all property of such corporation within this State or which shall thereafter come or be brought within the State.

Section 2. Any action or cause of action for any fine, forfeiture or penalty that the State of Texas has or may have against any corporation chartered under the laws of this or any other State, territory or nation, shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter. Whenever a corporation against which the State has heretofore instituted suit, or shall hereafter institute suit, forfeiture of its charter, or cancellation of its permit, or for fines or penalties under any law of this State, shall dissolve in this or any other State, or shall have a judgment rendered against it in this or any other State, for the forfeiture of its charter, the court in this State in which such suit is pending, shall appoint a receiver for the property and business of such corporation within this State or that may come or be brought within this State during such receivership, or the court may, in any case wherein the State is suing any such corporation for the forfeiture of its charter or of its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation, whenever the interests of the State may seem to require such action. If such dissolution shall take place or judgment of forfeiture be rendered against such corporation before this act takes effect, the court shall, upon the taking effect of this act, appoint a receiver for the property and business of such corporation in this State; and the State shall have the right to the writs of attachment, garnishment, sequestration or injunction without bond; to aid in the enforcement of its rights created by this act; and all property that may come into the possession of any receiver appointed under the provisions of this act, not otherwise exempt by law, shall be subject to the lien herein created, and for the payment of any such fines or penalty.

Section 3. The Attorney-General, or any district or county attorney acting under his direction, may bring suits in the name of the State of Texas for the foreclosure of such lien in the District Court of any county in the State of Texas, and in case the suit for foreclosure should be brought against any corporation which has dissolved or had a judgment for the forfeiture of its charter or the cancellation of its permit rendered against it, pending any suit by the State of Texas against such

corporation for forfeiture of its charter or cancellation of its permit or for fines or penalties, service may be had upon any person within the State who acted and was acting as agent of any such corporation in this State at the time of such dissolution or forfeiture of charter or cancellation of permit.

Section 4. The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this State, and shall not effect, change or repeal any other remedies or rights now existing in this State for the enforcement, payment or collection of fines, penalties and forfeitures.

Section 5. In case any suit should heretofore be brought in any of the courts of this State for the recovery of penalties mentioned in this act, the same shall not be settled or compromised without trial upon the merits thereof, without the consent and approval of the Attorney-General of the State.

Section 6. The fact that there is no law that prevents the abatement of actions or causes of action for fines and penalties when corporations becoming liable for same shall dissolve or be dissolved for forfeiture of their charters, or cancellation of their permit, and the fact that there is no adequate remedy for the collection and enforcement of such fines and penalties, creates an emergency and an imperative public necessity demanding that the constitutional rule requiring bills to be read on three several days in each house be suspended, and it is so suspended, and that this act shall take effect and be in force from and after its passage, and it is so enacted.

Approved, April 11, 1907.

NOTE. The complete text of the Texas Anti-Trust Acts of 1899 and 1903 is contained in briefs of associate counsel for plaintiff-in-error, and necessary portions thereof are incorporated in the "Statement" herein.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1908.

Nos. 359 and 360.

WATERS PIERCE OIL COMPANY,
Plaintiff in Error,

AND

STATE OF TEXAS,
Defendant in Error.

ADDITIONAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

The argument herein presented, on propositions submitted, is intended to be in addition to and in support of the presentation of the case made by the brief filed herein.

The judgment for $1,623,900 and for the cancellation of the permit of the Waters Pierce Oil Company to do business in Texas was rendered by virtue of the anti-trust laws of 1899 and of 1903; and the judgment appointing a receiver was rendered by virtue of the Act of 1907; all of these acts are contained in the appendix to the brief.

The references herein, unless otherwise specified, are to the Printed Record in Cause No. 359.

The propositions submitted in this argument, presenting constitutional questions, were all submitted and raised in the trial court, and assigned as error in the Court of Civil Appeals and presented in the petition for writ of error to the Supreme Court of the State of Texas, in accordance with the rules of practice and procedure, and of the statutes of the State of Texas, and have been presented by assignments of error in this Court.

We therefore submit for the consideration of the Court that:

THE ANTI-TRUST LAWS OF TEXAS ARE TOO VAGUE AND INDEFINITE TO BE ENFORCED.

The judgments below are void, under that provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which prohibits the States from depriving any person of property without due process of law; for the reason that they are penal statutes and are not couched in such explicit terms that the parties upon whom they are intended to operate might, with reasonable certainty, ascertain and determine what particular acts were prohibited; and for the reason that, as construed by the State Courts herein, it was left to the jury to determine whether or not the acts done "would be reasonably calculated" to effect the purpose prohibited, or "tended" to effect such purpose.

The established construction of penal statutes in Texas was correctly announced by the Supreme Court in the case of M. K. & T. Railway Company of Texas v. State, 100 Tex. Sup. Ct. 424, in which the court said:

"It is a well-established principle of statutory construction that penal statutes must be strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and the more disastrous the consequence to the person subjected to the provisions of the statute, the more rigid will be the construction of its provisions in favor of such person and against the enforcement of such law (Suth. Stats. Const., Sec. 322, Potter's Dwaris, 244). A penal statute such as now before us must be couched in such explicit terms that the party upon whom

it is to operate may, with reasonable certainty, ascertain what the statute requires to be done, and when it must be done; otherwise there would be no opportunity for a person charged with the duty to protect himself by the performance of it according to the law. (Suth. Stats. Const., Sec. 324 Potter's Dwaris, 246-251; Tozer v. United States, 52 Fed. Rep., 917). In the case last cited Judge Brewer said: 'But, in order to constitute a crime, the act must be one which the party is able to know in advance, whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable.' "

This construction by the Supreme Court of the State of Texas is supported by the case of Tozer v. United States, referred to by that court, and the case of C. & N. W. Ry. Co. v. Dey, 35 Fed. Rep. 876, wherein the Circuit Court said:

"No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

And is also supported by the case of U. S. v. Brewer, 139 U. S. 278, in which the court say: "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

The anti-trust law of the State of Texas, referred to as the Act of 1899, has four principal sections purporting to fine and prohibit acts by parties engaged in commerce.

The first section, eliminating unnecessary words, declares that "Any corporation . . . transacting or conducting any kind of business in this State . . . who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation, or understanding with any other corporation . . . to regulate or fix the price of any article of manufacture, etc., . . . shall be deemed and adjudged guilty of a conspiracy to defraud and to be subject to the penalties as provided in this act."

Section 2 enacts, omitting surplus words, as follows:

"A monopoly is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill,

or acts, or of any other valuable thing or possession, by or between persons, firms or corporations . . . whereby any one of the purposes or objects mentioned in this act is accomplished, or sought to be accomplished, or whereby any one or more of said puposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced."

Sections 3 and 4 are not involved in this case.

The trial court, in paragraph VII of its charge (Print. Rec., p. 288), submitted the case under the law as announced in section 1 of said Act of 1899; and in paragraph VIII of its charge (Print. Rec., p. 289) submitted the case under the law as announced in section 2 of said Act of 1899. In paragraph VIII the court authorized the jury to find the Waters Pierce Oil Company guilty and assess penalties against it as follows:

"If you find from a preponderance of the evidence that on June 1, 1900, or on any date subsequent thereto, and prior to March 31, 1903, the defendant, acting through its duly appointed and authorized agents, had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey, whereby the price in Texas of oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, you will return a verdict for the State and say by your verdict. We, the jury, find for the State on the issues submitted for our consideration in paragraph 8 of the court's charge. In this connection, you are instructed that if the defendant became a party to a pool of the character mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, if there were any such days, would constitute a separate violation of the anti-trust law of Texas."

That part of the verdict of the jury which refers to the Act of 1899 is as follows:

"We, the jury, find for the plaintiff against defendant on each

of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties $1,549,500" (Print. Rec., p. 314).

The two issues submitted to the jury under the Act of 1899 were contained in paragraphs VII and VIII of the charge referred to, and authorized a finding for the same period of time; that is, from May 31, 1900, the date that plaintiff in error was admitted to do business in Texas, down to March 31, 1903, the day upon which the Anti-Trust Act of the State of Texas of 1903 became effective and repealed the Act of 1899. So it is conclusively established that the jury found against plaintiff in eror under both paragraphs VII and VIII of the trial court's charge, and upon this verdict judgment was entered.

Waiving the question, for the time, as to whether or not section 1 of the Act of 1899, which was submitted under paragraph VII of the court's charge, is valid, we present the proposition that section 2 of said Act of 1899, which was submitted to the jury in paragraph VIII of the court's charge, is unconstitutional and void and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The very question announced by the Circuit Court in the case of Tozer v. United States, 52 Fed., 917, is presented by the second section of the Act of 1899, and contained in paragraph VIII of the court's charge; that is, the question of leaving it to a jury to determine what is reasonable or unreasonable. The jury were authorized to find against plaintiff in error, and did find against plaintiff in error, as manifest by their verdict, on the proposition that plaintiff in error "had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey . . . whereby the price in Texas of such oil would be reasonably calculated to be fixed or regulated."

Who can determine in advance what is "reasonably calculated" to be the effect on the price of oil by a combination or union of capital of two corporations? "Reasonably calculated" is a process

of mental speculation. One man may "reasonably calculate" one way, and another man equally as intelligent, may "reasonably calculate" just the reverse. In fact, that is what makes one good business man sell to another good business man; because each one "reasonably calculates" that he is getting the advantage of the other. To say, therefore, in a penal statute, and in a charge to a jury, as was said in the Act of 1899 and in the charge in this case, that the jury may find a party guilty and assess enormous fines, because, in the opinion of the jury, the act done was "reasonably calculated to regulate or fix the price of oil," is to remove all certainty from penal statutes and from proceedings in court. It leaves the citizen, and his property rights, absolutely at the mercy of twelve jurors, who, in many cases, know nothing about the character of the business being transacted.

In construing these words, we must remember, also, that it is the established law in Texas, that penal statutes must be "strictly construed in determining the liability of the person upon whom the penalty is imposed, and that the more severe the penalty, and more disastrous the consequence to the person subjected to the provision of the statute, the more rigid will be the construction in favor of such person and against the enforcement of such law." This language was used by the Supreme Court of Texas in passing upon a case where the State had sued for penalties for a failure on the part of a railway company to furnish certain accommodations at its depot, and was said in passing upon an assignment of error, which challenged the validity of the statute, for the reason that it violated the due process clause of the Fourteenth Amendment to the Constitution of the United States (State v. Ry., 100 Tex. 424). Authorities without number might be cited from Texas and other States in support of the same position, but they are deemed unnecessary.

The correctness of the authorities quoted, holding that such a law as section 2 of the Act of 1899, cannot be properly enforced,

is made more apparent by further reference to the charge and evidence in this cause.

In section XI of the court's charge (Print. Rec., p. 285), the jury were instructed with reference to the second section of the Act of 1899 as follows:

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this State to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited."

It will be observed that the court in this announcement of the law made it unlawful for the Waters Pierce Oil Company "to bring about or permit any union or combination of its capital, etc.;" while the law provided that "a monopoly is any union or combination or consolidation or affiliation of capital, etc., . . . by or between persons, firms or corporations." In other words, the law requires the union or combination to be "by or between corporation"; while the trial judge made it unlawful for the Waters Pierce Oil Company "to bring about or permit" such union or combination. Here was a distinct departure by the trial court from the law in his attempt to submit the matter to the jury, which of itself is a departure from the rules of due process of law in a penal case.

But when we turn to the action of the jury and the evidence upon which they acted, the departure is emphasized. In the determination of the question, as to whether or not there had been a monopoly formed, "by or between" the Waters Pierce Oil Company and another corporation or corporations, the principal evidence which the jury must act upon was contained in Stipulation No. 1

entered into by counsel in the case (Print. Rec., p. 424). That stipulation shows:

(1) That the Standard Oil Company of New Jersey is a corporation incorporated under the laws of the State of New Jersey in 1882, and that it has never conducted any business in the State of Texas.

(2) That said Standard Oil Company of New Jersey owned a controlling interest in the shares of stock of both the old and the new Waters Pierce Oil Company.

It further shows that the Standard Oil Company owned a controlling interest in the stock of a number of other oil companies.

There was absolutely no evidence showing, or attempting to show, that the price of oil in Texas had been "fixed or regulated" by this ownership of stock, and there is no evidence to show that this ownership of stock "would be reasonably calculated to fix or regulate the price."

There was certain evidence, admitted by the court, showing that the Standard Oil Company, a stockholder in the Waters Pierce Oil Company, sent its auditors to the office of the Waters Pierce Oil Company at St. Louis to audit the books of the latter company; that the Waters Pierce Oil Company made certain financial reports to the Standard Oil Company or its officers; and that an oral agreement had been entered into between H. C. Pierce and representatives of the Standard Oil Company of Ohio, in 1878, limiting territory; and that the new Waters Pierce Oil Company had thereafter confined its business to the territory occupied by the old company after 1878. It was not shown that these circumstances in any way affected the price of oil, and if they raised any doubt, such doubt was dispelled by the only positive testimony on the subject, which was given in the case, and that is the testimony of Mr. H. C. Pierce, introduced by the State, who testified as follows:

"A. I have managed the business of the various interests, com-

mencing with W. H. Cobb & Co., H. C. Pierce & Co., Waters. Pierce & Co., the Waters Pierce Oil Company organized in 1878, and the Waters Pierce Oil Company organized in the year 1900, down to the present time, with the exception of a short interval.

Q. Do you know, after the spring of 1900, when the new Waters Pierce Oil Company was organized, how its affairs and policies were managed?

A. I do.

Q. By whom?

A. By the officers and the directors and the executive committee, composed of the officers and directors and some of the heads of departments.

Q. Do you know who constituted the executive committee of the Waters Pierce Oil Company?

A. Myself, Mr. Finlay, the vice president; Mr. Adams, the treasurer; Mr. Gruet, the secretary; Mr. John D. Johnson, the general counsel; Mr. Stephen Johnson, manager of the lubricating department; Mr. Charles P. Ackert, general manager of the company. There may have been one or two more, but those are the names I now recall.

Q. Now, I will ask you, Mr. Pierce, whether the present Waters Pierce Oil Company ever had any understanding or made any agreement, expressed or implied, with either the Republic Oil Company, the Standard Oil Company of Indiana, or any other company or person in the State of Missouri, or elsewhere, for the purpose of fixing or intending to fix or maintain the price at which any of the products of petroleum should be sold upon the market?

A. Absolutely it did not.

Q. And has not, to your knowledge, down to the present time?

A. To my knowledge, and I know generally and particularly in regard to the affairs of the Waters Pierce Oil Company, it has not down to the present time" (Print Rec., p. 500).

This testimony was absolutely uncontradicted and was conclusive on the State.

Here we have a result, then, of a jury enforcing such a law, as the second section of the Act of 1899, by determining that one corporation, having acquired a controlling interest in the stock of another corporation, is "reasonably calculated to fix and regulate the price" of the commodity dealt in by such corporation. This,

too, in the face of the positive testimony of the manager of such corporation, and its other officers and agents, that it did not have such effect, and in face of the absence of any testimony to show that it had such an effect.

We assert, therefore, with confidence, that the Waters Pierce Oil Company had the right to proceed with its business in the State of Texas after the passage of the Act of 1899, believing that it was not violating the law, because it knew that such ownership of stock did not affect the price of oil in Texas, and because it could "reasonably calculate" that it would not do so. For doing this, it surely cannot be convicted as a criminal, and any law which attempts to make an act of such character a crime, is void, because it is not due process of law.

The anti-trust law of the State of Texas, referred to as the Act of 1903, has three principal sections: Section 1 on trusts section 2 on monopoly, and section 3 on conspiracy; only sections 1 and 2 are involved in this case.

The trial court, in submitting the law as embraced in section 1, instructed the jury in paragraph IX of the charge, as follows:

"IX. If you find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in this State of the business of selling oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, or to fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were, on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, you will return a verdict for the State, and say by your verdict, We, the jury, find for the State on the issues submitted for our consideration in paragraph 9 of the court's charge. In this connection, you are instructed that if the defendant became a party to a trust of the character mentioned in this paragraph of the charge, each day

between March 30, 1903, and April 29, 1907, that it remained a party to and acted under such trust, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas."

The trial court, in submitting the first subdivision of section 2 of said Act of 1903, charged the jury, in paragraph X of the charge, as follows:

"X. If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers, under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph of this charge, or to fix, maintain, or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the State and say by your verdict, We, the jury, find for the State on the issues submitted for our consideration in paragraph X of the court's charge In this connection, you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas."

The trial court, in submitting the law as embraced in subdivision 2 of section 2, charged the jury, in paragraph XI of the charge, as follows:

"XI. If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had, on March 31, 1903, or any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the pur-

pose and intention on part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the State, and say by your verdict, We, the jury, find in favor of the State on the issues submitted for our consideration in paragraph 11 of the court's charge. In this connection, you are instructed that if defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas."

By referring to the law itself, it will be found that the trial court attempted to construe the law, and determine what it meant, because the law is not literally followed in the charge.

In construing the first section of said Act of 1903, the trial court evidently intended to make the first subdivision of said section 1 a general statement or qualification on the subsequent subdivisions. In order to show why he did this, it is necessary to refer to the anti-trust law of 1889 (Revised Statutes of Texas, Art. 5313) and the construction thereof by the Supreme Court of Texas in the case of Queen Insurance Company v. State, 86 Texas 266-7. We quote the Act of 1889 so far as it is material:

"Article 5313. A trust is a combination of capital, skill, or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create or carry out restrictions in trade or commerce or aids to commerce, or to create or carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this State.

2. To increase or reduce the price of merchandise, produce or commodities.

3. To prevent competition in manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or to prevent competition in aids to commerce."

We quote the first section of the Act of 1903 so far as it is material:

"Section 1. Be it enacted by the Legisature of the State of Texas: That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them for either, any, or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce or in the preparation of any product for market or transportation."

It will be observed that in the first subdivision of section 1 of the Act of 1903 the words "which may tend" are inserted, and that in subdivision 2, the material words added, are "fix and maintain," and that in subdivision 3, the material word added is the word "lessen" before "competition."

Now before the adoption of the Act of 1903, the Supreme Court of the State had construed the Act of 1889, in the case of Queen Ins. Co. v. State, 86 Texas 267, in which the court said:

"It seems to us, therefore, that the words in the first subdivision of section 1 of the act, 'to create or carry out restrictions in trade,' were intended only as a general expression of the purpose of the law, and that the acts defined in the subsequent members of the section were intended as a specific definition of what was meant in the first."

After referring to another authority, the Supreme Court of the State again, on the same page, said:

"But it is a rule of construction, that each word and sentence should be presumed to be intended for a purpose, and that each

should be given effect; and it may be argued that our construction destroys the effect of the words in the first clause, and that under such construction they might have been omitted without changing the meaning of the section. But the argument defeats itself. If the words 'restrictions in trade' are not to be limited in their meaning, then all the subsequent parts of the section were unnecessary, and may have been omitted without altering the sense."

The trial court was, therefore, justified in construing the Act of 1903, in his charge to the jury, as the Act of 1889 had been construed by the Supreme Court of the State in the case referred to.

It is evident, and a jury would so understand, that the trial court intended to make the words, "for the purpose of creating in Texas, or which tended to create in Texas," a qualification, not only upon the words "restrictions in the free pursuit in this State of the business of selling oil refined from petroleum," but also intended them to be a qualification upon the words, "fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil." This makes his construction accord with the construction placed upon the Act of 1889 by the Supreme Court of the State, and makes the word "tended" qualify all that follows in paragraph IX of the charge; and therefore makes section 1 of the Act of 1903 void for uncertainty; for the reason that no one can tell in advance what act "tends" to a restriction in the free pursuit of business or "tends" to fix the price of a commodity, or "tends" to prevent or lessen competition in business.

Again, as to section 2 of the Act of 1903, the court, in paragraph X of its charge submits to the jury the question, that if the "direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, . . . under such circumstances, that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of oil, . . . or to fix, maintain, or increase the

price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the State, etc."; the same vice is presented in this paragraph in the use of the words "tended to create." This would make the first subdivision of section 2 void for uncertainty.

Again, in paragraph XI of his charge, the court, in submitting subdivision 2 of section 2, with reference to the Standard Oil Company of New Jersey acquiring the capital stock of the Waters Pierce Oil Company, made the same use of the words "tended to affect or lessen" by making them qualify all the facts submitted in that paragraph.

It will be observed that the court, in using the word "tended," as he did use it in paragraphs X and XI, followed the law as it is contained in section 2 of the Act of 1903.

The consequence is that the construction placed upon the Act of 1903 by the trial court, in all of the provisions thereof, which were submitted to the jury in this case, renders that act unconstitutional and void under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

We submit, therefore, with reference to the Anti-Trust Act of 1899, as construed and submitted by the trial court, and as to the Anti-Trust Act of 1903, as construed and submitted by the trial court, both of which constructions were approved by the courts of last resort in Texas, that both of said acts are thereby rendered unconstitutional and void.

This position is sustained by the decisions of the Supreme Court of the State of Texas. In addition to the cases heretofore referred to, we refer again to the case of the Queen Insurance Company v. State, 86 Texas 262, where the court, on the question of construing the anti-trust law of 1889, said:

"There is a maxim that ignorance of the law excuses no one, which is not true as applied to every case. For a man is not guilty of theft who honestly takes property under an honest claim of right, though he may be mistaken as to the law. But it is true in the sense that no one can allege his ignorance of the law which

makes a certain act penal, in justification of his commission of that act. If he be held bound to know the law, he should have the means of knowing it, and hence he should not be punished for the infringement of a statute unless it designate with a fair degree of clearness and precision the act or omission which is forbidden by it. The offense need not be defined in the logical or legal sense of that word; for general terms may be used which in themselves require to be defined; but the terms employed should be sufficiently definite in their meaning, as plainly to designate the very act, which is sought to be made punishable by law."

Again, in the case of G. C. & S. F. Ry. Co. v. Dyer, 84 Tex. 194, the court was passing upon a statute which authorized the recovery of a statutory penalty for a failure to deliver a bill of goods. After reviewing the entire case, the court announced the law with reference to the certainty required in statutes inflicting a penalty in such matters to be as follows:

"Every man is presumed to know the law, and it would seem that before any one should be punished, either in a criminal or a civil action, for an act claimed to be penal, the offense should be clearly defined, and that any grave doubt as to the intention of the Legislature should be resolved in favor of the defendant."

This was, and always had been, the law in Texas prior to the trial of the case at bar; and this construction of penal statutes by the courts of the State of Texas, being in accordance with the general law in force in the United States and in England, we conclude that such construction should be followed by this Court in this cause.

It is clear that the verdict under the Act of 1899, being based on a statute which authorized the jury to find from two hundred to five thousand dollars per day, and the jury finding defendant guilty under both sections of the charge submitting that act, that it is impossible for any one to determine what penalties they inflicted under the first section of that act, and what penalties under the second section, or how much the penalties were increased by their finding under the section section, which contains the objectionable clause, "reasonably calculated."

While the Act of 1903 fixed a specific penalty of fifty dollars per day, and the Court of Appeals of Texas says that this finding must be sustained, if either one of the paragraphs of the court's charge is correct, that is, either IX, X or XI of said charge; still we insist that we have clearly shown that the word "tended" was made to control the entire charge with reference to the Act of 1903, and it will be admitted, we conclude, that where an act is prohibited, which "tends" to accomplish a certain purpose, that it is so indefinite that no one can tell what acts are embraced within its provisions.

In the case of L. & N. R. R. Co. v. R. R. Commission of Tennessee, 19 Fed. 679, Judge Baxter, in construing the terms "reasonable rates" and "fair and just return" used in the statute regulating railroads, announced the correct doctrine on criminal stautes. At page 692 he says:

"We think the property of a citizen—and a railroad corporation is, in legal contemplation, a citizen—cannot be thus imperiled by such vague, uncertain, and indefinite enactments. The corporations and persons against whom this act is directed can do nothing under it with reasonable safety. They may take counsel of the commission, act upon their advice, and honestly endeavor to conform to the statute. But if a jury before whom they may be subsequently araigned, shall, in their judgment and upon such arbitrary basis as they are at liberty to adopt, conclude that the commissioners misadvised, or that the managers of the accused railroad corporation made a mistake in regulating their charges upon a 5 per cent., instead of a 4 per cent. basis, the honesty and good faith of the accused will go for nothing, and penalty upon penalty may be added until the defendant's property shall be gradually transferred to the public. This cannot be permitted. Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The Legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define with reasonable certainty

what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The Court of Appeals of Kentucky, in the case of L. & N. R. R. Co. v. Commonwealth, 35 S. W. 129, in passing upon the question of what is meant by "reasonable rates," held the statute to be in violation of the Fourteenth Amendment to the Constitution of the United States, as well as the State Constitution, and in so holding, said:

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied; and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded. The criminality of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged. And this latter depends on many uncertain and complicated elements. That the corporation has fixed a rate which it considers will bring it only a fair return for its investment, does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law, which may be known in advance, but on one erected by a jury; and especially so, as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

These, with the other authorities cited, we think, are sufficient to sustain our contention.

THE ANTI-TRUST LAWS OF 1899, 1903 AND OF 1907, AS CONSTRUED HEREIN, ARE EX POST FACTO LAWS.

The judgments below are void under the ex post facto provision of subdivision 1, section 10, Article I of the Constitution of the United States; for the reason that each of them, as construed by the courts of Texas herein, inflicted punishment on plaintiff in error for alleged acts done in violation of the anti-trust laws of 1899, 1903 and 1907 of the State of Texas, which acts, as shown by the evidence, were done prior to the enactment of said laws, and were not punishable when done in the manner in which they are punished by said judgments.

In the case of Kring v. Missouri, 107 U. S. 221-228, this Court quoted with approval the definition of Mr. Justice Washington as to what was an *ex post facto* law, as follows:

"An *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage."

And also, in the same case, quotes with approval the definition of the classes of laws which were classed as *ex post facto* by Mr. Justice Chase in the case of Calder v. Bull, 3 Dall. 386, as follows:

"1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2. Every law that aggravates the crime or makes it greater than it was when committed.

3. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed."

In the case of Fletcher v. Peck, 6 Cranch (U. S.) 138, Chief Justice Marshall defined an *ex post facto* law to be "one which renders an act punishable in the manner in which it was not punishable when it was committed."

As to the Anti-Trust Act of the State of Texas of 1899, it does not appear on its face to be retroactive. It would seem from its provisions that the Legislature intended it to apply to acts committed after it took effect, unless such construction can be placed upon the act by reason of the first part of section 14 thereof, which is as follows:

"Section 14. The provisions of the foregoing sections and the pains and penalties provided for violations of this act shall be held and construed to be cumulative to all laws now in force in this State. And provided that the provisions of this act shall not exempt from punishment or forfeiture any person, firm, association of persons or corporations, who may have violated or offended against any law now in existence that may be, or may be construed to be, repealed by this act or in conflict herewith."

This provision may have influenced the courts of Texas to hold that the punishment provided for in the law of 1899 could be inflicted for acts committed before it was passed by the Legislature.

It will be observed that the trial court, in paragraph VII of his charge (Print. Rec., 288), authorized the jury to assess penalties against plaintiff in error, "if it entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price of oil refined from petroleum, and if you further find from a preponderance of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents, on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, you will return a verdict for the State." The jury in their verdict assessed penalties under this charge "for each of the days between May 31, 1900, and March 31, 1903;" and judgment was entered therefor. (See verdict and judgment, Print. Rec., 314.)

Now, when we turn to the allegations and proof in the case to ascertain if plaintiff in error "entered into or became a party to an agreement or understanding with the Standard Oil Company of

New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from petroleum;" or to find that it "remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas," we discover that there is no pretense in the testimony that any such acts were done on June 1, 1900, or any day subsequent thereto and prior to March 31, 1903.

Defendant in error, in paragraph 2 of its petition, filed in the trial court (Print. Rec., 2), relied upon an agreement entered into in 1878, and certain written agreements entered into in 1882, and in the fourth paragraph of its petition (Print. Rec., 7 to 15) set out the agreement dated Jan. 2, 1882, called "Exhibit A," and also set out (Print. Rec., 16, 17) the supplemental agreement entered into on Jan. 4, 1882; and in the third subdivision of paragraph 4 of the petition, it alleged "that said defendants so entered into and became a party to the conspiracy then formed, and carried out and observed and performed the same up to the present time."

In proof of the agreements entered into, it was stipulated that the copies of the agreement of Jan. 2, 1882, and subsequent thereto of Jan. 4, 1882, marked exhibits "A" and "B," in plaintiff's petition, were true copies and should be introduced in evidence, and it was further stipulated that neither the Waters Pierce Oil Company nor Henry Clay Pierce had signed either of said agreements (Print. Rec., 398-9).

As to the agreement of 1878, and the carrying out of that agreement, the State relied upon the testimony of Mr. H. C. Pierce, in which he said (Print. Rec., 442-3):

"A. When, in 1878, I organized the first Waters Pierce Oil Company, its predecessors, Waters Pierce & Co. and H. C. Pierce & Co., had already established business in all the territory in which the present Waters Pierce Oil Company now operates, and it was agreed and understood between myself and the representatives of the Standard Oil Company of Ohio, I think, at least it was the only Standard Oil Company that I knew of being in existence at that time, that the first Waters Pierce Oil Company should confine its

operations and transact its business within a certain territory which Waters, Pierce & Co and H. C. Pierce & Co. had transacted their business. In other words, the Waters Pierce Oil Company organized in 1878 was to take over the business of Waters, Pierce & Co. In pursuance of this understanding, certain lines were agreed upon in the State of Illinois which comprise parts of, I think, Madison and St. Clair Counties, including East St. Louis."

The witness then described the teritory of the Waters Pierce Oil Company in Illinois and Missouri, and was then asked (Print. Rec., 443):

"Q. Continue with respect to the other territories, Mr. Pierce. That included parts of Illinois which you have described and the parts of Missouri that you have described, and what other territory?

A. The State of Arkansas; what is now the Indian Teritory and Oklahoma; the State of Texas; all of the State of Louisiana west of the Mississippi river, and the Republic of Mexico.

Q. Has there been any change in that territory since it was then established?

A. There has not.

Q. Pursuant to that division of territory the Waters Pierce Oil Company confined its operations to building up the trade within that teritory?

A. It did."

The witness further testified (Print. Rec., 448) as follows:

"A. Since the organization of the first Waters Pierce Oil Company, in the year 1878, neither myself nor any one connected with the Waters Pierce Oil Company, so far as I know, and certainly never with my authority, ever made any attempt to sell oil, to locate stations, or in any manner transact business outside of the territory in which the present Waters Pierce Oil Company now operates."

Again reverting to this question, the witness testified (Print. Rec., 449-50):

"A. The Waters Pierce Oil Company has been, and now is, dependent upon the Standard Oil Company for almost its entire supplies, and as I have already stated, the territory within which the Waters Pierce Oil Company, the present and its predecessors, were to operate was established twenty-eight years ago and has not been changed. I, as the manager of the Waters Pierce Oil

Company, did not deem it expedient to do business beyond the territory wherein the Waters Pierce Oil Company was thoroughly and fully equipped.

Q. Why didn't you deem it expedient?

A. Well, my judgment was against it generally.

Q. Why was your judgment against it?

A. It is a very difficult matter, General Hadley, to specifically define the basis of a judgment arrived at which is based upon a great many years of experience, but if the question is to be answered from the standpoint of to-day, it would be that the Waters Pierce Oil Company was not equipped to do business in Kansas City.

Q. Why haven't you equipped it to do business there?

A. Because the original Waters Pierce Oil Company agreed to confine its operations to the territory in which it, and its predecessors, has transacted its business.

Q. Who did it agree with?

A. It agreed, I should say, with Colonel Oliver H. Payne, the individual I presume you are seeking for?

Q. The representative of what company?

A. At that time the Standard Oil Company of Ohio.

Q. As a result of that agreement the Waters Pierce Oil Company has, in the State of Missouri, confined its business to certain territory, and the Standard Oil Company has confined its business to certain territory?

A. As to the Waters Pierce Oil Company, yes. As to the Standard Oil Company, I have not now, and have never had, any means of knowing the reasons for its operations.

Q. So far as the Waters Pierce Oil Company is concerned, your testimony is that according to an agreement it has not sold in the State of Missouri.

A. That was only the initial reason. I gave you the main reason first.

Q. But there was an agreement in the matter?

A. I have stated so."

Again reverting to the question of agreement (Print. Rec., 497), Mr. Pierce testified:

"A. When the Standard Oil trust was organized I was urged to place the Waters Pierce Oil Company in the trust, but refused to do so, and even after the 40 per cent. of the capital stock of

the Waters Pierce Oil Company issued to Hutchins & Thompson and the 20 per cent. issued to Chess, Carley & Co. had been placed in the trust by the Standard Oil Company of Ohio, to whom it had been transferred, I still refused to place my stock in the trust. When the first Waters Pierce Oil Company was organized it was agreed by all parties interested that I should control and direct its policy."

Again Mr. Pierce testified (Print. Rec., 498):

"A. It simply refreshes my memory. When the license of the first Waters Pierce Oil Company to do business in Texas was revoked, and I thought to settle with the State so that we could continue our business there, I was told very frankly by prominent citizens of Texas that the people of that State would not tolerate the methods of the Standard Oil Company, and that no corporation controlled by that company would be permitted to carry on business in Texas. I explained this situation fully to the executive committee of the Standard Oil Company, and they agreed that I should organize a new company, the stock of which I should hold, and that I should manage and control the company absolutely free from any dictation or direction of the Standard Oil Company. This was done, and in order that the company should conduct its business in strict accordance with the laws of every State in which it was operating, I placed the attorney of the company on the executive committee, with instructions to examine all reports and transactions to the end that no law should be violated. I earnestly desired the company to respect and obey the laws."

Again Mr. Pierce testified (Print Rec. 498-9):

"A. Up to the spring of 1904 the Standard Oil Company made no attempt to interfere in any way with my management and control of the Waters Pierce Oil Company, but at that time they transfered the stock which had stood in my name to Mr. M. M. Van Buren, and began in other ways to assume a control over the affairs and operation of the company. I protested against this conduct as a violation of their agreement with me, and as contrary to the representations which I had made to the people of Texas. After frequent interviews and discussions on this point, the management and control of the company were again committed to my direction, and my son, Clay Arthur Pierce, is now president of the company, and conducting it as an independent business."

The agreement testified to by Mr. Pierce, as having been entered into in 1878 by the old Waters Pierce Oil Company, and the Standard Oil Company of Ohio, is the only agreement proven. It is, therefore, a material inquiry to ascertain whether or not this agreement was unlawful; and to determine this fact, it is necessary to ascertain the ownership of the old Waters Pierce Oil Company.

On this subject Mr. Pierce testified (Print. Rec., 497):

"A. I have a memoranda answering that question, which I will read. During the fall and winter of 1877 and 1878, I organized, under the laws of the State of Missouri, the first Waters Pierce Oil Company, which succeeded to the business of Waters, Pierce & Co. The original capital was $100,000, of which amount Waters, Pierce & Co. subscribed for 40 per cent. Horace A. Hutchins and William D. Thompson, of Camden, Ohio, subscribed for 40 per cent., and Chess, Carley & Co., of Louisville, Ky., subscribed for 20 per cent. . . . Some time after the organization of the first Waters Pierce Oil Company the 40 per cent. belonging to Hutchins & Thompson and the 20 per cent. belonging to Chess, Carley & Co. was transferred to the trustees of the Standard Oil Trust, and I purchased the interest of William H. Wolter in the 40 per cent. belonging to Waters, Pierce & Co. So that when, on May 29, 1900, the first Waters Pierce Oil Company was liquidated the assets were distributed in these proportions."

This testimony, which was uncontradicted, shows that at the time of the agreement of 1878, the Standard Oil Company had no interest in the Waters Pierce Oil Company.

The next material inquiry, as to the lawfulness of this agreement, is the character of business done by the Waters Pierce Oil Company and the Standard Oil Company at the time the agreement was made.

On this subject Mr. Pierce testified (Print. Rec., 443-4):

"Q. When the Waters Pierce Oil Company—the old company—was organized in 1878, it succeeded the partnership of Waters, Pierce & Co.?

A. It did.

Q. From what source did the Waters Pierce Oil Company obtain its supplies of refined oil at that time?

A. Almost exclusively from the Standard Oil Company.

Q And from what source have it since that time obtained its supplies of refined oil?

A. Almost exclusively from the Standard Oil Company and its allied interests.

Q. Did the old Waters Pierce Oil Company or the present Waters Pierce Oil Company refine any oil or manufacture any of the products of petroleum in the United States?

A. It did not manufacture refined oil. It did manufacture lubricating oils and greases.

Q. All these other oils were obtained from the Standard Oil Company and its allied interests—Standard Oil Company of New Jersey?

A. All of the refined oil, naptha, gasolines and most of the lubricating oil were obtained from the Standard Oil Company and its allied interests.

Q. In other words, the Waters Pierce Oil Company was engaged exclusively as a merchant of manufactured products in the United States?

A. Within the United States almost exclusively so."

Then again reverting to this question (Print. Rec. 448-9), Mr Pierce testified:

Q. Now, Mr. Pierce, the Waters Pierce Oil Company and the firms which preceded the Waters Pierce Oil Company, and the old Waters Pierce Oil Company, organized in 1878, undertook to merchandise within the territory then allotted it, the products of the Standard Oil Company, and it has continued to occupy relatively that position ever since, is that true?

A. The firms which preceded the first Waters Pierce Oil Company purchased crude oil and crude petroleum from parties other than the Standard Oil Company, because in the beginning the Standard Oil Company did not have an existence, and refined and manufactured such crude oils into refined oil at their refinery located in St. Louis on the ground between 13th and 14th and Austin and Bratiott streets, and sold that oil wherever it could. When the firm of W. H. Cobb & Co. was organized in 1869, and succeeded the firm of J. R. Finlay & Co., it for a time continued the same method of transacting its business, but when the Standard Oil Com-

pany came into existence the firm of W. H. Cobb & Co. commenced purchasing crude petroleum and its refined products from the Standard Oil Company, and also continued purchasing from other parties. This method continued until the organization of the first Waters Pierce Oil Company in 1878. Does that answer your question sufficiently?

Q. Now, since 1878?

A. During and since 1878 the Waters Pierce Oil Company within its United States territory has acted almost solely as merchandiser of products of the Standard Oil Company, and in Mexico, since the establishment of refineries there, it has purchased crude oil outright from the Standard Oil Company and has manufactured and sold it in Mexico to the full extent of the demand."

Again reverting to this question (Print. Rec., 472), Mr. Pierce testified:

"Q. Why hasn't the Waters Pierce Oil Company developed oil fields and refined oil?

A. Well, I have not thought it to the interest of the Waters Pierce Oil Company to do so.

Q. You say the development of oil fields and establishment of refineries near the point of consumption lessens the cost?

A. The Waters Pierce Oil Company was not in the business of refining oil in the United States.

Q. You were authorized to do so in your charter?

A. We were authorized to do a good many things we did not do.

Q. Why did you think it not advisable to do so? Was it because you agreed with the Standard Oil Company not to do so?

A. No, sir, there was no such agreement ever made between myself and the Standard Oil Company. On the contrary, the Waters Pierce Company has built and is operating four very large refineries on its own account absolutely without hindrance from the Standard Oil Company, and has been doing so for the past twenty-five years.

Q. And that has lessened the cost to the consumer?

A. Very materially.

Q. Why haven't you established refineries in Texas, then?

A. Because the Waters Pierce Oil Company was not prepared to establish oil refineries. It had no facilities for doing so, and it was receiving its refined products from the Standard Oil Company

promptly and of good quality, and in a way to enable it to care for all of the business that I thought it would be advisable for the Waters Pierce Oil Company to engage in, and other people than the Standard Oil Company, as well as the Standard Oil Company, were refining oil in the State of Texas, and the Waters Pierce Oil Company has taken from the Standard Oil Company the production of the refinery at Corsicana, and all the products of the Security Oil Company in Texas, and there was no occasion for the Waters Pierce Oil Company to go into the refining business and invest capital when it could purchase oil from them more cheaply."

Again reverting to the same question (Print. Rec., 479), Mr. Pierce testified:

"Q. You could have bought from anyone you pleased, but you did not please to buy from anyone but the Standard?

A. Precisely.

Q. And the Standard could have sold to anyone they pleased, but its products were almost exclusively handled through the Waters Pierce Oil Company?

A. I think it was wisdom on the part of the Standard Oil Company to utilize the services of such a good merchant as myself."

This is the testimony in the cause, explaining the character of business done by the Standard Oil Company and the Waters Pierce Oil Company. It shows that the Standard Oil Company was a producing and manufacturing company, and that the Waters Pierce Oil Company was a mercantile company—a buying and selling company. The testimony also shows that the Standard Oil Company had as early as 1882, and probably had in 1878, various companies or agencies, in different portions of the United States engaged in selling its oil to consumers.

The Waters Pierce Oil Company had an established mercantile business in a certain territory in which it agreed to continue business. Was it unreasonable or unlawful for the Standard Oil Company to desire or to contract for the Waters Pierce Oil Company to continue to do business in the territory where it was established? We think not, as the Waters Pierce Oil Company was then, and continued to be, a customer of the Standard Oil Company. Was it unlawful for the Waters Pierce Oil Company to contract to con-

fine its business to that territory? We think not. It had an established business in the territory and the territory was a very large one, embracing parts of the States of Illinois, Missouri and Louisiana, and all the States of Arkansas, Texas, and what is now Oklahoma, and the entire Republic of Mexico. As the Waters Pierce Oil Company purchased the larger portion of its supplies from the Standard Oil Company, there was no inducement for it to go into other portions of the United States, and spend large sums of money in preparing to do business, where the Standard Oil Company already had established agencies or connections or customers, who were engaged in the sale of the same products; and likewise there was no inducement for the Standard Oil Company to spend large sums of money in the territory where the Waters Pierce Oil Company was doing business, in preparation to engage in business itself, when it was selling its products to the Waters Pierce Oil Company, which was already prepared to do business in that territory. As between the parties, the contract was mutally beneficial and was, therefore, upon a sufficient consideration. It was simply a business arrangement, entered into by business men of experience, for a proper and economical conduct of a given business. Consequently it was valid between the parties, and was in nowise invalid, unless it violated a well-established public policy.

When Does a Contract in Partial Restraint of Trade Violate Public Policy?

The clearest statement of the law on this subject which we have been able to find is made by Mr. Justice Bradley, in the case of Oregon Steam Navigation Company v. Winsor, 20 Wall (87 U. S.), 64:

"There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is, the injury to the public by being deprived of the restricted party's industry; the other is, the injury to the party himself by being precluded from pursuing his occupation and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not

to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.

In accordance with these principles, it is well settled that a stipulation by a vendee of any trade, business or establishment, that the vendor shall not exercise the same trade or business, or erect a similar establishment within a reasonable distance, so as not to interfere with the value of the trade, business or thing purchased, is reasonable and valid. In like manner a stipulation by the vendor of an article to be used in a business or trade, in which he is himself engaged, that it shall not be used within a reasonable region or distance, so as not to interfere with his said business or trade, is also valid and binding. The point of difficulty in these cases is to determine what is a reasonable distance within which the prohibitory stipulation may lawfully have effect. And it is obvious, at first glance, that this must depend upon the circumstances of the particular case; although, from the uncertain character of the subject, much latitude must be allowed to the judgment and discretion of the parties. It is clear that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protrected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, a stipulation is unobjectionable and binding which imposes the restraint to only such an extent of teritory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be not prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions."

Now we have seen that the territorial contract between the Standard Oil Company and the old Waters-Pierce Oil Company was "founded on a valid consideration and a reasonable benefit" to both parties. The evidence also shows that the Standard Oil Company was "the vendor of an article to be used in a business, or trade, in

which it was engaged;" that is, that the Standard Oil Company was selling to the Waters Pierce Oil Company refined petroleum to be re-sold by the Waters Pierce Oil Company. The evidence also shows that the limitations agreed upon on behalf of the Waters Pierce Oil Company confined it "within a reasonable region or distance, so as not to interfere with the business or trade" of the Standard Oil Company. The evidence also shows that the stipulation "imposed the restraint to only such an extent of territory as was necessary for the protection" of both parties. The evidence shows further that neither party was "prevented from pursuing its calling;" and shows that "the country was not deprived of the benefit" of the exertions of either party; because, the evidence shows, that the Standard Oil Company had never done business in Texas, and the Waters Pierce Oil Company had never done business outside of the territory referred to; and shows that the parties limited themselves to the territory where they were prepared to do business.

On this question of preparation to do an oil business, it is not deemed necessary to quote the testimony. But it is abundantly shown in the record, and is a matter of common knowledge, that to economically conduct the jobbing and retail trade, in a given territory, requires a party engaging therein to invest in a large number of tank cars, iron barrels, station tanks, horses and wagons, and other necessary instruments for the conduct of the business. It is probably more expensive to construct and maintain such instrumentalities than it is to construct and maintain the ordinary buildings for the conduct of the usual commercial business. In addition to this, there are standard brands of oil, which are called for by the trade, just like standard brands of other commodities, and these brands are owned and controlled by the parties producing the manufactured oil. The Waters Pierce Oil Company had established a trade in the brands of oil manufactured by the Standard Oil Company. All these facts are shown by the record and are uncontroverted. Therefore, we assert that the contract proven to have been made, and alleged to have been a division of territory, came exactly

within the rules laid down in the case refered to, as being a contract unobjectionable to, and not in violation of, public policy.

The case of Oregon Steam Navigation Co. v. Winsor, referred to on this point, was quoted with approval in the case of Gibbs v. Consolidated Gas Co., 130 U. S. 396, in which latter case the contract was held void, because the Gas Company held a franchise, "to fulfill public purposes to subserve which they were incorporated." The doctrine announced by the State courts follow the same rule as announced by this Court in the case refered to.

The case of Diamond Match Co. v. Roeber, 106 N. Y. 473, involves a very similar question. That was a case where the Match Company brought suit to enjoin Roeber from engaging in the manufacture and sale of matches in the city of New York, in violation of an agreement which he had made in the sale of a similar business, in the city of New York, to the Match Company. The court held the contract valid, as being only in partial restraint of trade, because Roeber was not prevented from engaging in a like business in the State of Nevada and the Territory of Montana. The marked distinction between the two cases is, that in the case at bar, the Waters Pierce Oil Company is not restricted from doing business where it had been engaged in business, but simply agreed not to go into other portions of the United States; and the Standard Oil Company was not restricted in doing business where it had been doing business, but simply agreed not to go into the territory where the Waters Pierce Oil Company was engaged in business. Therefore, in the case at bar, there is no question about the agreement being simply "in partial restraint of trade."

In the case of McCurry v. Gibson, 108 Ala. 451, the Supreme Court of Alabama said:

"It is well settled law that while contracts in general restraint of trade are against public policy and void, yet those in partial restraint, founded upon a valuable consideration, and reasonable in their operation, are valid and binding. . . . The test which is laid down by which it may be determined whether a contract is reasonable, whether it affords only a fair protection to the interests

of the party in whose favor it is made, without being so large in its operation as to interfere with the interests of the public; Homer v. Granes, 7 Bing., 735-743; and this test has been uniformly followed in subsequent cases: Cooke v. Johnson, 47 Conn. 175; Brewer v. Marshall, 19 N. J., eq., 547; Chappell v. Brockway, 21 Wend. 157. A partial restraint is that which is restrictive in its operation in respect to place; and this may be made in express terms or it may result from a construction of the contract when viewed in the light of the environment and circumstances surounding the contracting parties."

We have gone thus far into a consideration of the contract of 1878 entered into by the old Waters Pierce Oil Company, for the reason that the trial court, in submitting the question of "an agreement and understanding with the Standard Oil Company of New Jersey," could have referred to no other agreement except this one of 1878. There is no proof of an agreement made by the Waters Pierce Oil Company organized in 1900 with the Standard Oil Company of New Jersey, or with any other company, to fix or regulate prices. The only evidence showing any agreement with the Standard Oil Company at the time of the organization of the present Waters Pierce Oil Company is contained in the testimony of Mr. H. C. Pierce heretofore quoted, in which, among other things, he says:

"I explained this situation fully to the executive committee of the Standard Oil Company, and they agreed that I should organize a new company, the stock of which I should hold, and that I should manage and control the company absolutely free from any dictation or direction of the Standard Oil Company. This was done, etc."

This testimony shows that there was no agreement between the present Waters Pierce Oil Company and the Standard Oil Company to fix or regulate prices of oil; but on the contrary, an agreement was made at the time of the organization of the present Waters Pierce Oil Company that its management and control should be absolutely free from the Standard Oil Company. It shows further, that the present Waters Pierce Oil Company was not thereafter bound to restrict its business to the territory specified in the

contract of 1878; and the testimony of Mr. Pierce shows that its doing so was simply because of his judgment as to what was the best business policy for the Company.

So that the record herein clearly and distinctly shows that the present Waters Pierce Oil Company had never entered into any contract or agreement to fix the price of oil in Texas, or any contract that could be so construed; but notwithstanding this fact, the trial court submitted to the jury the question of "an agreement or understanding," and in doing so could have had reference only to the territorial agreement of 1878 entered into by the predecessor of the present Waters Pierce Oil Company. Now that agreement was entered into by the predecessor of the present Company before the passage of any of the anti-trust laws of Texas. Said anti-trust laws, when passed, provided for the punishment of parties for entering into or carrying out agreements to fix prices. The trial court, in construing the anti-trust laws, and in submiting the questions to be determined by the jury, applied such laws to an agreement entered into in 1878 by the predecessor of the present Company, without any proof that the present Company had any connection with such agreement. By doing so, the trial court authorized the jury to apply the anti-trust laws to an agreement entered into before their passage, by the predecessor of the present Company, and authorized the jury to punish the present Company for "carrying out" such agreement, without proof that it had done so, and without proof that such agreement would fix or regulate prices of oil.

That this made the anti-trust laws *ex post facto,* seems clear; for the reason that it is perfectly lawful for the present Waters Pierce Oil Company to "continue" to do business in Texas, and for the Standard Oil Company of New Jersey to "continue" to do business in other portions of the United States. The only reason for claiming that such method of doing business would be in violation of the anti-trust laws, was the alleged fact that the old Waters Pierce Oil Company and the Standard Oil Company of Ohio

had, in 1878 entered into a territorial agreement. By the construction which the trial court placed upon the law and the facts, the agreement entered into between the old Waters Pierce Oil Company and the Standard Oil Company of Ohio, was made a necessary element of the "agreement," for which the present Waters Pierce Oil Company was convicted by the jury. Now that agreement was an act done prior to the passage of either of the anti-trust laws, by corporations neither of which was a party to this action, and at a time when the present Waters Pierce Oil Company was not in existence. The present Company could not have "continued," or "carried out" that agreement, for the reason that to do either would require it to be a party thereto. Now, we do not think that the decision of this Court in the case of United States v. Trans-Missouri Freight Association, 166 U. S. 342, contravenes the position which we here take. That was a case where the original parties to the agreement were before the Court. The agreement was one to fix and regulate the price of transportation. In passing upon the question, this Court said:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the low no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued, it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which

occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise."

We do not question the correctness of the decision in the Trans-Missouri Freight Association case. The power of Congress to regulate commerce between the States is doubtless such as to authorize it to declare such an association unlawful, and to provide means for enjoining the carrying on of such an association. The judgment in that case effected that purpose and no other. But that is not the case at bar. Here we have an agreement entered into, in 1878, by parties not before the Court. We do not think the agreement was unlawful when entered into, but if unlawful, it was not punishable as subsequently provided for in the anti-trust laws of Texas. Because of such agreement the judgments below punished the present Waters Pierce Oil Company, as provided for in the anti-trust laws of Texas. This made such laws, as herein applied, *ex post facto,* by inflicting such punishment upon the present Company for an act which was not so punished at the time the act was done, and by punishing it for the act of other parties, committed before the passage of said anti-trust laws.

Neither do we think that the case of the State of Texas v. M. K. & T. Ry. Co. of Texas and the American Express Co., 99 Tex. 547, is an authority against our position. In that case the contract between the railway company and the express company provided for giving exclusive privileges to the express company on the lines of the railway company. That contract was unlawful at the time it was made, because it violated Article 4540, R. S. of Texas, which required railroad companies to furnish equal facilities and accommodations, upon reasonable and equal rates, to all the companies engaged in the express business. This article was in force when the contract was made, and the Texas court, in deciding the case, at page 528, in discussing the police power of the State, said:

"It is unnecessary in this case to go into any extended examination of the question as to the extent of this power. If we had before us a contract which was originally lawful and reasonable

in itself, and which, although falling within the literal language of the statute, could not justly be regarded as so injurious to the State or its citizens as to afford reasonable grounds for its destruction, a different question would be presented. It is true that there are limitations upon the power of the Legislature to either strike down contracts already made or unreasonably and arbitrarily to restrict the liberty of citizens in contracting in future, but there is no occasion for applying them here. This contract was, as we have seen, made in the face of a statute then existing, and was not a reasonable, and can hardly be said to have been a lawful one; and it is wholly unnecessary to pursue an inquiry which might arise with reference to contracts of a different character."

By this decision the Supreme Court of Texas left the question which is involved in this case open for consideration when it should arise. Besides, there was involved in the case which the Texas court was then deciding, the same power of regulating common carriers. It is probable that all contracts of common carriers, affecting transportation, are made in view of the fact that such transportation may be regulated, and by the regulation, the contract may be more or less modified, if not destroyed. Consequently, neither of the cases referred to are authoritative in determining the case at bar; and the case at bar is one in which the anti-trust law referred to, as applied, is *ex post facto.*

Anti-Trust Laws as Applied to Combination Herein are Ex Post Facto.

The trial court, in paragraph VIII of its charge, authorized the jury to convict the defendant under the Act of 1899, "if the defendant had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey whereby the price in Texas of oil" was fixed, etc.; and further instructed the jury, "that if the defendant became a party to a pool of the character mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, . . . would constitute a separate violation of the anti-trust laws of Texas" (Print. Rec., 289).

Now the testimony shows that some time after the organization of the first Waters Pierce Oil Company, the Standard Oil Trust acquired from two of the stockholders therein 60 per cent of the stock in that company and held the same down to the time of the dissolution of that company, and that its assets were distributed on that basis—40 per cent to H. C. Pierce and 60 per cent to the Standard Oil Company. The testimony also shows an agreement between the Standard Oil Company and Mr. H. C. Pierce that he was to organize a new company, the stock of which he should hold.

There was no testimony as to a union or combination of capital by the Standard Oil Company of New Jersey with the Waters Pierce Oil Company, except the testimony of stock ownership in the Waters Pierce Oil Company by the Standard Oil Company. The testimony shows that this ownership of stock by the Standard Oil interests commenced soon after the organization of the old Waters Pierce Oil Company in 1878, and continued down to the time of the dissolution of that company. From the organization of the new Waters Pierce Oil Company down to June 1, 1904, the stock stood in the name of H. C. Pierce on the books of the Waters Pierce Oil Company, and, therefore, gave him the legal power during that period to vote the stock, and thereby absolutely control that company. By the amendment to its charter (Print. Rec., 1017), the Standard Oil Company of New Jersey was authorized to acquire and hold stock of other corporations. Under the law of the State of New Jersey, as announced in the case of Trenton Potteries Co. v. Oliphant, 58 N. J. 507, the court say, near the close of the opinion: "Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations."

There was no law in Texas prohibiting the Standard Oil Company of New Jersey from owning stock in the Waters Pierce Oil Company, at the time the stock was acquired. Therefore, the holding

of the stock of the Waters Pierce Company by the Standard Oil Company was a lawful holding, and was a vested property right, at the time of the passage of the anti-trust law of 1899, and at the time of the passage of the anti-trust law of 1903. Could the continuance of this lawful holding of stock by the Standard Oil Company, and this vested property right be made a penal offense and punished by laws passed by the State of Texas after such holding had been acquired and such property right had been vested?

In the case of Calder v. Bull, 3 Dall., U. S. 387, Mr. Justice Chase, in delivering the opinion of the court, and in enumerating the powers of the Legislature, said:

"The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

In the course of a learned discussion of retroactive laws, at page 329, he quoted the following:

"In 2nd Lord Raymond 1352, Raymond, Justice, called the statute 7 Geo. 1st Stat. 2, par. 8, about registering contracts for South Sea stock, an *ex post facto* law, because it affected contracts made before the statute."

The case of Fletcher v. Peck, 6 Cranch 138, was a case wherein the State of Georgia, by legislative act, had granted title to certain land. The party to whom they were granted sold them to another party. The Legislature of the State of Georgia afterwards repealed the law of making the grant and forfeited the title. The opinion in the case was delivered by Marshall, Chief Justice. After having decided that the grant was a contract which vested title, he then proceeded to discuss the question as to whether or not the act of repeal and forfeiture was an *ex post facto* law within the mean-

ing of subdivision 1, section 10, Article I of the Constitution. In the course of his discussion, he said:

"The State Legislature can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The Legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

It is, then, the unanimous opinion of the court that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles, which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error.'"

This statement of the law was quoted with approval by this Court in the case of Cummings v. Missouri, 3 Wall. 277; and in the latter case this Court held that the requiring of an expurgatory oath from a priest before he should be permitted to discharge the duties and functions of his prieshthood, was included within the terms *ex post facto* laws; and in deciding the case, the Court, among other things, said:

"Now, some of the acts to which the expurgatory oath is directed were not offenses at the time they were committed. It was no offense against any law to enter or leave the State of Missouri for the purpose of avoiding enrollment or draft in the military service of the United States, however much the evasion of such service might be the subject of moral censure. Clauses which prescribe a penalty for an act of this nature are within the terms of the definition of an *ex post facto* law —'they impose a punishment for an act not punishable at the time it was committed.'"

These authorities warrant the statement that a law is *ex post facto* which deprives the owner of property, lawfully acquired, of the right to use the same; and this classification of the law is made conclusive when there is a penalty affixed for using such property. Therefore, we submit that the anti-trust law of 1899, as construed in this cause, was an *ex post facto* law.

As to the anti-trust law of 1903, the trial court charged the jury, in paragraph IX of his charge (Print. Rec., 289-90), that if the defendant entered into a combination of its capital with the capital of the Standard Oil Company for the purposes prohibited in said act, and "that the defendant remained or was a party to and acted under such combination, if such there were, on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, you will return a verdict for the State, etc.," and making each day between the dates stated a separate offense. The jury found for the State on this issue for all days between March 31, 1903, and April 29, 1907. There was no evidence that there was any combination of the capital of the Waters Pierce Oil Company with the Standard Oil Company of New Jersey, made on March 30, 1903, or on any date subsequent thereto. The verdict of the jury, therefore, could not be supported by any other evidence except that hereinbefore referred to in discussing pargraph VIII of the court's charge, as to the acquiring of stock in the Waters Pierce Oil Company by the Standard Oil Company. All the authorities and argument under paragraph VIII of the charge are, therefore, applicable to paragraph IX.

In paragraph X of the charge the trial court instructed the

jury that, if they found "that the direction of the affairs of the defendant corporation and of the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, etc.," they should find for the State (Print. Rec., 290). The jury found for the State on this issue and assessed penalties for each day between said dates (Print. Rec., 315). Now the testimony heretofore referred to shows that the affairs of the Waters Pierce Oil Company were under the management and control of Mr. H. C. Pierce, who had no connection with the Standard Oil Company during all of said period of time, and was not interfered with "up to the spring of 1904," when the Standard Oil Company transferred the stock which had stood in his name to M. M. Van Buren and "began in other ways to assume a control over the affairs and operations of the company." Mr. Pierce protested against this, and this interference stopped, and the company has since been managed by him and his son, Clay Arthur Pierce, "as an independent business."

So that the finding of the jury, that the control and management of the two companies were the same from March 30, 1903, to April 29, 1907, can only be supported by the proof offered as to the agreement made in 1878, and as to the Standard Oil Company acquiring stock in the Waters Pierce Oil Company in about 1890, and the agreement for the organization of the new company, as made by Mr. Pierce with the executive committee of the Standard Oil Company; all of which acts were done long prior to the passage of the statute of 1903, and were not unlawful when done, and the rights and interests vested thereunder had been acquired before the passage of the later act. Under the authorities heretofore quoted, we submit that this construction of the Act of 1903 made it an *ex post facto* law.

The court, in paragraph XI of his charge (Print. Rec., 291), instructed the jury that, if they found "that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date

subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention . . . to prevent or lessen the competition in the sale in Texas of oil, you will return a verdict for the State. . . . In this connection, you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April, 29, 1907, that it remained a party to such monopoly" constituted a separate violation of the law. The jury found a verdict for the State on this issue and assessed penalties for each of the days between March 30, 1903, and April 29, 1907.

Now, as heretofore stated, there was no pretense in the testimony that the Standard Oil Company acquired any stock in the Waters Pierce Oil Company, between the dates mentioned. So that, the construction placed upon the law of 1903 in this paragraph of the charge will make it an *ex post facto* law; for the reason, as heretofore given, that the Standard Oil Company had lawfully acquired such stock, and had a vested property right therein, before the passage of said law of 1903, and the Waters Pierce Oil Company was punished for such act of the Standard Oil Company by the verdict of the jury. We refer again to the authorities heretofore quoted and the evidence referred to herein, with the addition of the following stipulation (Print. Rec., 1023):

"It is agreed for the purposes of this case, only, upon the following facts, subject to all legal objections thereto:

Second: That said Standard Oil Company of New Jersey did own in the Waters Pierce Oil Company, a corporation organized under the laws of the State of Missouri, in May, 1878, 2747 shares out of a total of 4,000 shares of the said company, and that since about the 24th day of September, 1900, it has owned 2748 shares of the capital stock out of a total of 4,000 shares of the Waters Pierce Oil Company organized under the laws of the State of Missouri, May 29, 1900."

This stipulation was signed by counsel for both parties (Print. Rec., 1025).

These paragraphs, VII, VIII, IX, X and XI, of the trial court's charge were the only ones submitting and construing the anti-trust laws of the State of Texas on the trial of the main case.

The Act of April 11, 1907, *Giving Lien to the State and Authorizing the Appointment of a Receiver, as Construed in This Cause, is Retroactive.*

The Act of 1907, by section 1, gave the State lien on all of the property of corporations violating the anti-trust laws from the date that suit was instituted by the Attorney General or District or County Attorney, for the purpose of cancelling the permit of the corporation, or for fines and penalties, and provided that the institution of the suit should be notice of the lien. And further provided:

"Where any such law has heretofore been violated, or shall be violated before the taking effect of this act, and cause of action exists for such fines, penalties or forfeiture, or shall come into existence before the taking effect of this act, and suit shall be filed in such case, the State shall have the lien to secure the payment of such fines, penalties and costs from the time this act shall take effect, on all property of such corporation within this State, or which shall thereafter become or be brought within the State."

Section 2 of the Act of 1907 provided for the appointment of a receiver, whenever a corporation should dissolve in Texas, or any other State, or should have a judgment of forfeiture rendered against it, and then provided, "or the court may in any case wherein the State is suing any such corporation for the forfeiture of its charter or of its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation whenever the interest of the State may seem to require such action."

The matters in connection with the appointment of a receiver in this cause are set out and contained in Plaintiff in Error's Bill of Exceptions, tendered in the trial court and signed by the Judge

of that court, in the order in which they occurred (Print. Rec., 333-349).

This Bill of Exceptions shows that after the rendition of the judgment, and after the filing of a motion for a new trial, by the Waters Pierce Oil Company in the trial court, counsel for the State filed in said cause (which is Cause No. 359 in this Court) motion for the appointment of a receiver (Print. Rec., 336-7). This motion first sets up the rendition of the judgment for $1,633,-900, and the cancellation of the permit of the defendant in said cause to do business in Texas, for violations of the anti-trust laws of the State of Texas.

The second ground was about some proceedings in the Supreme Court of the State of Missouri, which was immaterial, it not being supported by any evidence, and not alleging anything as a fact.

The third ground alleged that the penalties adjudged could not be collected outside of the State, and the property of the defendant in the State was inadequate to pay the judgment, and was personal property that was easily removed, and then alleged, "that, under and by virtue of an Act of the Legislature of the State of Texas, approved April 11, 1907, the State has a lien upon all of said property to secure the payment of the above mentioned judgment."

The fourth ground is as follows:

"Fourth: That under the judgment of ouster rendered in this case, the defendant has no right to do business in this State, and has been convicted of doing business in this State in violation of the law for each and every day since the issuance of its permit seven years ago; that it is necessary to preserve and protect the rights of the State that said business of said defendant should be conducted and carried on, at least temporarily, and be kept a going concern in this State."

Whereupon the State prayed for the appointment of a receiver and for an injunction.

The hearing on this application was set down for June 8. On June 7 the motion for new trial in the main penalty case was over-

ruled and notice of appeal given, and on the same day defendant Waters Pierce Oil Company tendered a bond for $3,275,000, for an appeal and supersedeas, to the clerk of the trial court (Print. Rec., 338). The trial court, on June 8, called up the application for the appointment of a receiver. Defendant Oil Company then raised the question as to its having tendered a bond, and the trial judge advised the clerk, whose duty it was to approve the bond, that the bond was insufficient, and the clerk declined to approve it. Whereupon the defendant asked time to secure an additional bond, and the cause was postponed until the 10th (Print. Rec., 339).

Various proceedings were had until, on the 15th day of June, 1907, the final order appointing the receiver was made by the trial court (Print. Rec., 344); and on the 19th the receiver's bond was approved (Print. Rec., 348).

In the Bill of Exceptions referred to (Print. Rec., 340) it is shown that the defendant Oil Company answered the application for a receiver by a demurrer, by general denial and by special denial of the allegations with reference to the proceedings in the Supreme Court of the State of Missouri; which answer was properly verified by two of the counsel for the defendant Oil Company. It was further shown in said Bill of Exceptions (Print. Rec., 341-2) that the court heard argument on this demurrer from the counsel for the defendant Oil Company, but declined to hear any from the State's counsel, and proceeded to announce his conclusions, and stated that he would take judicial notice of the proceedings in the case, and of the judgment finding the Oil Company guilty for violating the anti-trust laws, and cancelling its permit, and then announced "that it had been found guilty of violating the said anti-trust laws on each and every day from the first day of June, 1900, to the 29th day of April, 1907, and that its present permit to do further business in the State had been forfeited and canceled by reason of said violation, and that defendant had since May 31, 1900, been a member of an agreement which had its very existence in Texas, and in violation of the civil and criminal laws of Texas, and that it has been and still is in possession of certain instrumentalities by means

of which it, in violation of the public welfare and interests, intended to continue its violation of the law pending appeal from the judgment of conviction, and that the court would assume that the defendant would file its proper supersedeas bond from the said judgment of conviction, but that, notwithstanding defendant's right to so file the said supersedeas bond within the time provided by law, the court was of the opinion that the Legislature had provided as a remedy or means of preventing defendant from the continued violation of the law, that a receiver should be appointed to take charge of its property and business and deprive it of its instrumentalities by which it had so violated the law and would continue to violate law; and that because of such statutes, and of the declared purpose of defendant, speaking through its general counsel, John D. Johnson, in newspaper interviews which had been brought to the attention of the court, in which said Johnson had discussed the effect of the aforesaid judgment of conviction against defendant, and had declared the purpose of defendant to appeal from said judgment of conviction and to continue to carry on its business in the same manner that it had theretofore done, notwithstanding such judgment of conviction; and without any evidence being submitted to the court in connection with said application, the court thereupon announced that it would grant the said application and appoint a receiver as therein prayed for."

This opinion of the court announces the following:

(a) That the court would act upon the proceedings and judgment in the main case of which he would take judicial notice, without the introduction of any evidence.

(b) He declares that the property of defendant Oil Company, which it was using in conducting commerce, were instrumentalities which it used to violate the anti-trust laws.

(c) He declares that it intended to continue violating said laws, this finding being based on alleged newspaper interviews of its general counsel which had been called to the attention of the court.

(d) He admits that the defendant would appeal and give a supersedeas appeal bond.

(e) He construes the Act of 1907 as authorizing the appointment of a receiver to take charge of the defendant Oil Company's business and property, on account of the acts which it had done prior to the passage of such law, and that it authorized such appointment to prevent a defendant from using its property in commerce in violation of such law, as had been determined in the judgment appealed from.

Here was a distinct construction of the Act of 1907, which was set up and relied upon in the application for the appointment of a receiver, made by the trial court, by which construction such act was held to be valid and was held to authorize the appointment of a receiver, and to fix a lien on defendant's property, because of acts done before the passage of such law. This construction of the Act of 1907 has been approved by the higher courts of the State of Texas. Does such construction make said act unconstitutional as being an *ex post facto* law?

Now, one of the rights of property, inherent in the contract by which it is acquired, is the right of possession and use. The value of the use of property is materially affected by the question as to whether or not it is free from a lien of any character. Defendant Oil Company had acquired possession of its property and there was no lien upon it. It had conducted its business for a number of years, as it believed, lawfully. At the expiration of seven years the State passes a law giving a lien upon its property for penalties, which the State claimed to have been incurred during said seven years. The effects of said lien are:

(a) To cloud the title of the property of the defendant Oil Company, which would embarrass it in the making of needed extensions and improvements, borrowing money on the credit of such property, and selling goods in the usual course of trade.

(b) This would result in the destruction of the business of the defendant Oil Company, and of the value of its property used in such business, and would thereby destroy the most valuable property right in said business and property.

All these results were to be inflicted on account of acts previously done.

The appointment of a receiver authorized the seizure of the defendant Oil Company's property, and authorized the receiver to deprive it of the benefits to be derived from possessing said property, and conducting its business. The costs of a receivership become a burthern upon the property, and must be paid out of it. The management and conduct of the business is taken from those who have had long experience, and are experts in the conduct of such business, and placed in the hands of persons of unknown experience, ability or qualifications. Necessarily, the value of the good-will of the business would be materially impaired and lessened.

Now, neither the Act of 1899 or of 1903, nor any law of the State of Texas prior to the passage of the Act of April 11, 1907, created a lien upon the property of the corporation for violation of said anti-trust laws, nor provided for the appointment of a receiver for the property of a corportion charged with the violation of these two anti-trust laws; neither did any law of the State fix such lien, nor authorize the appointment of a receiver by the institution of a suit to collect penalties. Therefore, we submit that the law of 1907 violated the property rights of the defendant Oil Company, which were vested by its contract in acquiring its property in Texas, and that such deprivation and the fixing of the lien upon said property, increased the punishment of the defendant Oil Company for acts done prior to the passage thereof.

The courts of Texas have always held that this could not be done. In the case of ex parte Meyer, 27 Tex. Sup. Ct. 723, the court makes this statement in deciding the cause:

"We are then to deduce as correct conclusions from these cases that the contracts designed to be protected by the Constitution are, first, contracts by which private rights of property are vested."

This statement was made in considering the question of an *ex post facto* law. This announcement of the law is in accordance with the authorities heretofore cited in this cause, and is illustrated in the report of the case of United States v. Hall, 6 Cranch, 174,

in which counsel for defendant in error Hall, in presenting the case, made this argument:

"3. The act of Jan. 9, 1809, cannot apply to this case so as to make that penal which before was justifiable.

Marshall, C. J., stopped the counsel and observed that the court would never consider the penal act as applying to previous facts, unless such construction be absolutely unavoidable."

We submit that being deprived of the use of property, and having a lien fixed upon property, is punishment within the meaning of the term *ex post facto* law; and that the application of such punishment on account of previous acts, where authorized by the law, or by the construction of the law, brings the same clearly within the terms of an *ex post facto* law.

In the case of Cummings v. Missouri, 71 U. S. 277, this Court said:

"The Constitution deals with substance, not shadow. Its inhibition was leveled at the thing, not the name. It intended the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."

The Legislature has power to pass laws for the suppression of trusts and combinations, but such laws must conform to fixed constitutional rules. The prohibition of *ex post facto* laws clearly prohibits the creation of a statutory lien or the appointment of a receiver for acts previously done. The lien and the receivership increase the punishment. This result cannot be accomplished under the guise of an additional remedy for the suppression of trusts. Such a construction would be permitting the "name" of the act to control, and not giving effect to the "substance."

It may be that the anti-trust laws of the State of Texas, of 1899 and 1903, as well as the Act of 1907, are in some of their provisions constitutional, so far as the wording of the acts are concerned; but the construction placed upon such laws by the trial court, which is

approved by the higher courts of Texas, renders them unconstitutional. The case of L. & N. R. Co. v. Eubank, 184 U. S. 34, is directly in point on this proposition. This Court had theretofore, in the case of L. & N. R. Co. v. Kentucky, 183 U. S. 503, held that Sect. 218 of the Constitution of the State of Kentucky was not obnoxious to the Constitution of the United States. But in the Eubank case, in 184 U. S., the State court had held that said Sect. 218 applied to "a long haul from a place outside of to one within the State, and a shorter haul between points on the same line and in the same direction, both of which were within the State;" and this Court held that such construction of said Sect. 218 by the State court made it obnoxious to the commerce clause of the Constitution of the United States.

If the statutes on which the judgments below are based are unconstitutional and void, the judgments themselves become unconstitutional and void; and we submit that all of said laws, as construed by the State courts, are unconstitutional and void, being in conflict with the *ex post facto* clause of the Constitution of the United States.

The matters and things referred to in Printed Record, Cause No. 359 in this Court, are contained in the record in Cause No. 360, which latter record also contains certain proceedings in the Court of Civil Appeals, and the Supreme Court of Texas, referring to the matter of receivership. The argument and authorities heretofore presented are intended to apply to the same matters and things presented in Cause No. 360 as referred to in Cause No. 359.

Since the preparation of the foregoing argument on the subject of *ex post facto* laws, we have been served with notice and copy of motion to dismiss case No. 359, a part of which motion is as follows:

The Twenty-second and Twenty-third Assignments of Error complain of the action of the trial State Court in refusing to sustain exceptions to portions of Defendant in Error's petition and refusal to give special charges asked by the Plaintiff in Error covering the

phase of the case made by the pleadings of the Defendant in Error, charging agreements about divisions of territory between the Plaintiff in Error and the Standard Oil Company of New Jersey. It is sufficient to say that the court did not authorize a conviction of the Plaintiff in Error for any such agreement, no such question was passed on in the State Court of Appeals, and therefore there is nothing upon which to base this assignment of error. On the contrary the State trial court instructed the jury to find for the Plaintiff in Error upon all issues made by the pleadings and not submitted to the jury in paragraphs VII and XI, inclusive, in the charge of the court, and we submit that an examination of the charge will disclose that not the shadow of a cause of action or offense is submitted in either of these charges of the court growing out of any such dnvision of territory."

This is a distinct, definite and binding waiver and abandoment by Defendant in Error of any right to sustain the judgments below on account of the territorial agreement of 1878 or the "carrying out" or "continuing to observe" such agreement by the Plaintiff in Error. By abandoning all claim to recover under such agreement in this Court, the Defendant in Error leaves this Court to determine the cause on the theory that there was no "agreement to fix the price of oil" upon which the jury could return a verdict in the trial court; for the reason that this was the only agreement proven, and there was no pretense of proof of any other or different agreement.

In the present state of the record we respectfully submit the following proposition:

(a) The admission made in this Court that the Defendant in Error was not entitled to recover in the trial court on account of the agreement of 1878, does not cure the error of the trial court in submitting the agreement to the jury, and approving their finding on that issue.

(b) The abandonment, by the Defendant in Error, of any claim on account of the agreement of 1878, and the admission made in this Court, leaves the case in the attitude, that the De-

fendant in Error procured a judgment below, on account of the agreement of 1878, and now admits that said agreement cannot be considered by this Court; therefore, it admits the procurement of a judgment below on evidence which cannot now be considered by this Court. The result is, the Defendant in Error admits that it has a judgment obtained without evidence, which means that it has taken the property of Plaintiff in Error without due process of law.

This action of the Defendant in Error in making the admission referred to in this Court cannot undo what Defendant in Error did in the trial court, or what the jury or the trial court did. The record shows the following: Defendant in Error, in its petition in the trial court, paragraph III, set up and declared upon the agreement of 1878 and alleged that the same was "still being carried out" (Print. Rec., 4, 5 and 6). This allegation was repeated in paragraph VIII of the petition (Print. Rec., 28, 29 and 30), subdivision 5 of paragraph VIII being as follows:

"That the division of territory previously agreed upon whereby the business operations of the Waters Pierce Oil Company should be confined to the territory hereinbefore named, and whereby neither the Standard Oil Company nor any of the companies under its control (other than the Waters Pierce Oil Company), should sell refined oil and the products of petroleum therein, has been insisted upon by the Waters Pierce Oil Company since May 31, 1900, as before, and has been acquiesced in by said Standard Oil Company and its allied interests and subsidiary corporations named in the trust agreement hereinbefore set out, all of whom are engaged in the same business as defendant, and has been observed by said Standard Oil Company (except in so far as it may have secretly and surreptitiously operated in said territory); that during that period said Waters Pierce Oil Company has by and in the State of Texas, through its officers, agents and employees, and through all of its stockholders of said defendant Company, maintained and undertaken to enforce, and has enforced an agreement, understanding and conspiracy which has precluded and prevented other corporations engaged in the sale of oil and its products, from selling oil in said territory, and has thereby maintained and controlled the

price of oil and its products, and established and maintained a monopoly, and said agreement and said monopoly so established from the time of the organization of the Waters Pierce Oil Company has been maintained by defendant from May 29, 1900."

On the trial of the case the Defendant in Error proved by the deposition of H. C. Pierce (Print. Rec., 442, 448 and 449), that the agreement of 1878 was entered into, specifying the territory as then occupied by the Waters Pierce Oil Company, to be the territory in which it would continue to do business, and proved by the same witness that the business of the Waters Pierce Oil Company has been confined to that territory up to the present time. This testimony has heretofore been quoted.

The court, in paragraph VII of its charge to the jury, which has heretofore been quoted, authorized the jury to find against Plaintiff in Error, if they found that it had entered into an agreement to fix or regulate the price of oil in Texas. Paragraph XII of the court's charge (Print. Rec., 291 and 292) is as follows:

"XII. The evidence introduced before you does not show with sufficient definiteness that the defendant has since May 31, 1900, acted under or persisted in the performance of either the contract with Clem and the Eagle Refining Company and others, or the contract with Roy Campbell and the Texas Oil and Gasoline Company, in such manner as to violate the anti-trust laws of 1899 or 1903. You are therefore instructed to find in defendant's favor on the issues pleaded by the State with reference to said contracts."

In this paragraph the court withdrew from the consideration of the jury certain contracts which had been introduced in evidence, but it will be observed that he did not withdraw from the consideration of the jury the contract and agreement of 1878. This shows conclusively that the court was intending by paragraph VII of his charge to permit the jury to find a verdict on account of that paragraph.

There were only two issues submitted to the jury under the law of 1899, and they were submitted in paragraph VI and paragraph VIII of the charge. The verdict of the jury on this

branch of the case shows that the jury found against Plaintiff in Error under paragraph VII of the charge and under paragraph VIII of the charge and assesed a joint penalty of $1,549,500 for the violation of the Act of 1899. This was about $1500.00 for each day on which the jury found against the Plaintiff in Error. It is impossible to tell how much the jury assessed on account of the issues submitted in paragraph VII or on account of the issues submitted in paragraph VIII of the charge. That part of the verdict is as follows (Print. Rec., 314):

"We, the jury, find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties $1,549,500.00."

Judgment was rendered on this verdict.

Any contention that the agreement of 1878 was not relied upon in the trial court is without support in the record. On the contrary, the record shows that such agreement was plead, proven, submitted to the jury and verdict returned thereon, which verdict was carried into judgment.

We submit that the result of this error cannot be cured by the admission in this Court that the Defendant in Error does not now rely upon such agreement; and that the abandonment by Defendant in Error of any reliance upon such agreement does not weaken, but strengthens our contention that the application and construction of the Act of 1899 in this record by the trial court makes that act an *ex post facto* law.

Again we say that the present attitude of Defendant in Error in this Court makes the judgment below in this record one which takes from Plaintiff in Error its property without due process of law.

THE ANTI-TRUST LAWS OF THE STATE OF TEXAS OF 1899 AND 1903, AND THE ACT OF 1907, AS CONSTRUED AND APPLIED HEREIN, ARE VOID, BECAUSE THEY AUTHORIZE THE ASSESSMENT OF EXCESSIVE FINES, PENALTIES AND PUNISHMENT.

The judgment against the Waters Pierce Oil Company, plaintiff in error, for $1,623,900 and for the cancellation of its permit to do business in Texas, and the judgment appointing a receiver, are void under the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the reason that they assess such excessive penalties and punishments, when considered in connection with the character of the business done and the offense charged, as shocks the conscience of mankind.

The case of M., K. & T. Railway Company of Texas vs. State of Texas, 100 Tex. Sup. Ct. Rep., 422, was one involving the validity of a statute of the State of Texas, requiring railway companies to furnish, and keep in specified conditions, certain facilities at each of its passenger stations on its line of railway. The Supreme Court of the State, in announcing the law with reference to such statutes, in view of the due process clause of the Constitution of the United States, said:

"The plaintiff in error challenges the validity of the law, for the reason that it is in contravention of the Fourteenth Amendment to the Constitution of the United States, which provides: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' The prohibitions contained in this clause of the Constitution apply 'to all the instrumentalities of the State, and to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State violates the constitutional inhibition, and, as he acts in the name and for the State, he is clothed with the State's power, his act is that of the State' (Chicago, B., etc., Ry. v. Chicago, 166 U. S. 233). After stating the facts of a proceeding

in court which was held to be due process of law, the Supreme Court of the United States, in the case last cited said: 'But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing the forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, and not to form.' If the statute involved in this litigation is invalid, then the fact that the proceedings in the court are regular will not constitute it due process of law, by which the penalties denounced against the railroad company would be enforced."

After making this statement of the law, the court discussed the facts of the case, and then concluded by saying: "Surely such a law, if enforced, would take from the railroad company its property, in the penalties exacted by the statute, without due process of law, in violation of the principles of right." This was said in a case where the penalties assessed were only $1800.

This Court, in the case of ex parte Young, 209 U. S. 123, in passing upon the railroad rate statutes of the State of Minnesota, prescribing heavy fines and penalties, and punishment of agents and officers by confinement in the penitentiary, said:

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Section 5 of the anti-trust law of the State of Texas, of 1899, made each day's violation of its provisions an offense, and subjected the party violating the same to a penalty of not less than two hundred dollars nor more than five thousand dollars for every such offense.

Section 7 of said act authorized the forfeiture of the permit of

active political campaigns in Travis County, involving the question as to whether or not the Waters Pierce Oil Company was a trust, and whether or not its admission to do business in Texas had been procured by fraud. He shows that, among others who engaged in this campaign, were himself, Judge A. W. Terrell, former minister to Turkey under Mr. Cleveland's administration; Mr. Taylor Moore, formerly District Attorney, and member of the Legislature from Travis County; Mr. Cocke, a member of the Legislature from Bexar County, and others. This is shown to have been a very thorough and exciting campaign; one in which the people were divided and very bitterly arrayed. He shows also that he had talked to people all over the county, and that they generally considered the Waters Pierce Oil Company as a trust, and that it had been readmitted to do business in Texas through fraud. His testimony is supported by a large number of other witnesses, and is practically uncontradicted. The testimony further shows that this agitation had been going on in Travis County practically ever since the readmission of the Waters Pierce Oil Company to do business in the State.

It shows, again, that this agitation was not local, but was supported by the daily press of the State. At page 208, an extensive exhibit is made from the Houston Chronicle, a daily paper published in Houston, Texas, containing statements, exhibits and figures, which were calculated to arouse the prejudices of the people. At page 209 are publications from the Austin Statesman, another local paper, denouncing the plaintiff in error as a trust.

In fact, this testimony shows that, if it is possible, by political controversy and denunciation of a corporation, its officers and agents, and those who are alleged to be friendly to it, to so arouse the people of a county that they will inflict an excessive punishment upon such corporation, that it was done in this case.

That such had been the effect of the agitation is apparent from the testimony which was offered to show that the president of the corporation was indicted without evidence. When a county is so aroused that a grand jury, in the solemn discharge of their duty,

acting under oath, will indict any person for so grave an offense as a felony, without hearing testimony, and when the District Attorney, representing the State, will prepare and return such an indictment, knowing that it was found without evidence, it seems apparent that the prejudices and passions of the people are very much aroused. This had occurred just a year before the trial of this cause, and occurred about the time this suit was instituted. The notice and comments upon the filing of the suit, in the local press, was on Sept. 21, 1906 (Print. Rec., 226), and the notice of the indictment of Mr. H. C. Pierce was on Nov. 22, 1906 (Print. Rec., 227). Unfortunately, this controversy about the legality of the transactions of the Plaintiff in Error was not confined to a discussion in a political campaign, but after the institution of this suit, the proceedings therein became involved in the same political discussion. So that the local paper referred to as publishing the previous notices did, on Dec. 28, 1906, publish and commented excitedly upon a demand made by the Attorney General for certain evidence in this cause (Print. Rec., 228-236). The controversy, with reference to this demand, was continued through the local press, and was carried into the Legislature, which assembled in Austin, Travis County, in the following January. The same controversy occupied the time of the Legislature for a large period of time, during the session of 1907, just previous to the trial in this cause. It was one of those bitter controversies, which sometimes occur, in the Legislatures of the various States, and probably attracted the attention of every qualified juror in Travis County. This record, in fact, would indicate that all such persons participated in the controversy. It does not seem strange, then, that the jury in the case, selected after such agitation, would be incapable of that calm deliberation necessary to arrive at a proper verdict.

Neither is it surprising that, under the conditions set forth, the jury found against the plaintiff in error on every issue that was submitted to them; nor that they applied the anti-trust laws to acts committed before the passage of such laws, nor that their finding was without evidence to support it in many things that were involved in

their verdict. In other words, they might have been expected to do, as the gand jury did in returning the indictment against Mr. H. C. Pierce, make their finding without evidence being introduced to support it.

Bearing on the question of excessive penalties, it is a fact that the County Attorney, who was one of the counsel representing the State, held an elective office in Travis County, and was doubtless zealous in the prosecution of those he deemed to be violators of the law.

The judge who tried the case, also held an elective office in Travis County, and may be assumed to have been familiar with all the controversies which had taken place in that county with reference to the Waters Pierce Oil Company. We always assume that judges are perfectly fair, and do not intend to do otherwise herein. But judges are human beings, just the same as other people are, and the nearer they are to the people in times of great disturbances, the more liable they are to have their opinions and judgments affected by the passions and prejudices surrounding them. The trial judge determined the law of the case, approved the verdict and caused judgment to be entered thereon. In examining the judgment to see whether or not it imposes excessive penalties, it is entirely proper, we think, to examine the rulings of the court to see what they indicate.

In the first place, he overruled eighty-nine special exceptions to the plaintiff's petition, except one—Special Exception No. 70 (Print. Rec., 72, Cause No. 360). This exception he sustained; it was to the allegation that the Standard Oil Company and its allied interests had used "codes" and stationery with only "26 Broadway" thereon, and had sent out letters without their being signed. A careful examination of the other exceptions and of the petition filed by the State, we submit, shows that many of the exceptions should have been sustained, at least, in part.

The trial judge overuled the application to change the venue (Print. Rec., 283, Cause No. 360). We submit again, that a careful investigation of the testimony offered on the motion to change

the venue shows that the chances of the Waters Pierce Oil Company to get a fair and impartial trial in Travis County would, to say the least of it, be doubtful. It is the duty of the court to see that every party has a fair and impartial trial.

In the submission of a case to the jury, under the practice and procedure in Texas, it is the duty of the trial court to apply the law to the facts. The trial judge in this case, in applying the law to the facts, so constructed his charge, as we have heretofore shown, as to leave it to the jury to determine whether certain acts "were reasonably calculated" to fix the price of oil, and whether certain other acts "tended" to fix the price of oil, etc. He also constructed his charge in such manner that the jury could apply it to acts which had occured before the passage of such laws (Print. Rec., 288-290, Cause No. 360). The court refused all of the twenty-five special charges requested by the plaintiff in error (Print. Rec., 294-312, Cause No. 360). As shown in our brief, a number of these special charges would have applied the correct law to the facts in the case, and would have aided the jury in reaching a correct conclusion.

After the return of the verdict, the State made its application for the appointment of a receiver, and the opinion announced by the trial judge in sustaining that application strengthens our contention that he was not in that frame of mind which conduces to such an administation of the law as is in keeping with the standard of its administration in the United States. This opinion of his has been heretofore copied.

The Court of Civil Appeals, located also at Austin, in Travis County, in its opinion (Print. Rec., 1141, Cause No. 360), approved all that the jury and the trial judge had done. On the question of the excessiveness of the punishment, the Court of Civil Appeals said (Print. Rec., 1161, Cause No. 360): "The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence, we have reached the conclusion that the verdict is not so large as to

render it manifest that the jury were actuated by prejudice or other improper motives." This is the only reason assigned by the court for thinking that the punishment was not an infliction of such excessive fines and penalties, as would be the taking of Plaintiff in Error's property without due process of law.

Now, we submit that the fact that the verdict is under the maximum permitted by the law is no reason for holding that it is not unconstitutional, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Suppose a statute authorized the imposition of a penalty from five dollars to ten million dollars, for entering into a contract which had theretofore been lawful. It might be considered that the imposition of a fine of five dollars would not be excessive, but could it be said that any amount between five dollars and ten million dollars would not be excessive, because it was much under the maximum?

Again, the question that the court relies upon, of the long continued violation of the law by the Plaintiff in Error, is one to be looked to, in the light of the testimony. As to whether or not Plaintiff in Error's doing business in the State of Texas was wrongful, had been a matter of discussion, it seems from the record, among the people of the State during this entire period of time. The testimony heretofore referred to, shows that the people themselves were divided upon this question. It and the authorities which we have heretofore presented, as we believe, conclusively show that Plaintiff in Error had not violated the anti-trust laws; for even now, in this, the Court of last resort, it is a doubtful question, to say the least of it. This being true, can it be said with safety that the largest penalty ever imposed in the history of the State, and probably larger than has ever been imposed in the majority of the States of the Union, can be justified upon the account of a long-continued violation of the law. It must be admitted from this record that the Plaintiff in Error and its counsel, who were learned in the law of the land, honestly believed that it was not violating the law.

Surely, then, the fine cannot be justified on the ground that it was an habitual criminal.

The Court of Civil Appeals also say that they reach the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives. What size verdict would indicate prejudice or other improper motives? Here was a case where the testimony showed that the physical property of the Waters Pierce Oil Company in Texas was valued at a little over a million dollars. In its application for the appointment of a receiver, the State of Texas avers that it was informed and believed that the property of the Oil Company in the State of Texas was wholly inadequate to pay the judgment, and this statement was verified by the County Attorney (Print. Rec., 324). So we have a case in which the judgment imposed a penalty of $1,623,900.00 on a corporation having property within the State of little more than a million dollars in value, for entering into business contracts which were lawful when made; but still the Court of Civil Appeals of Texas conclude that it is not large enough to show prejudice or other improper motive. In other words, a verdict which confiscates over a million dollars worth of property and still is not satisfied is not large enough to show prejudice or other improper motive. If it is not, it seems difficult for the human mind to conceive of one that would be large enough. We submit that the Court of Civil Appeals of Texas erred in so holding.

The attempts of the Defendant in Error, and its representatives, to get possession of Plaintiff in Error's property is worthy of notice, on the question of inflicting unusual punishment.

On June 21st, the Attorney General and the receiver appointed by that court, applied to the Court of Civil Appeals of Texas, setting up the appointment of such receiver, and in the language of the Court of Civil Appeals, "The application concludes with a prayer for extensive relief against the receiver appointed by the judgment of the United States Court, etc." (Print. Rec., 39, Cause No. 360). The Court of Civil Appeals again, in the same opinion, says (Print. Rec., 48, Cause No. 360): "Plaintiff's prayer is for

a very large order, going to the extent of asking this court to appoint a receiver to recover and take possession of the property, and a mandatory injunction against the receiver, W. B. Dorchester, to forthwith cease acting as receiver, and to turn over and deliver to the receiver, to be appointed by this court, control and management of all the property of the defendant." This the Court of Civil Appeals declined to do. Thereafter, on Dec. 14, 1907, the Attorney General, County Attorney and associate counsel filed in the Supreme Court of the State an application (Print. Rec., 64-67, Cause No. 360), asking the Supreme Court to "direct Robt. J. Eckhardt to take actual and physical possession of the property of the Waters Pierce Oil Company, and conduct the business of such corporation under such orders as this court may make, pending the final disposition of this cause in this court." This application was properly verified by the Attorney General, and was amended, the amendment being filed Dec. 18 (Print. Rec., 67-72 inclusive, Cause No. 360). In this amended motion there was a prayer that the Supreme Court revoke its order, recalling the mandate of the Court of Civil Appeals in the matter of the receivership, and also a prayer for the same relief as in the original motion. The opinion of the Supreme Court upon this subject, in which the motions were refused, will be found on pages 72 to 81, inclusive (Print. Rec., Cause No. 360).

At the time the receiver was appointed, it was admitted that the judgment would be secured by a supersedeas bond; and during all the other proceedings by which the Defendant in Error, through its counsel, was attempting to get possession of the property of the Plaintiff in Error, the said judgment was secured by a bond in double the amount thereof.

In addition to the amount of the verdict for penalties, the judgment canceled the permit of the Oil Company to do business in Texas. This was a valuable right, and had three years to run.

The Oil Company had expended large sums of money in its preparation to do business in the State; and to stop it from doing business would necessarily entail a large loss upon it. Besides this,

the judgment appointing a receiver for the property of the Oil Company would deprive it of any character of control over that property, and would place its business in the hands of persons of un known experience or ability in handling the same; so that the chances were, the value of its business would be largely impaired by the receivership. It does not seem that there was anything else which could have been done to the Plaintiff in Error by the judgment of the court in which this case was tried, by way of punishment for the offenses with which it was charged.

In view of all of these facts, we submit that the judgment below assesses such penalties, fines, forfeitures and punishment against the Plaintiff in Error, under the facts and circumstances disclosed by this record, as render such judgment unconstitutional and void, for the reason that it takes Plaintiff in Error's property, and all of its property subject to that jurisdiction, without due process of law.

Summary of Argument.

We submit and insist upon each and all of the assignments of error and propositions presented in the main brief in these causes, for the reason that we believe all of them should be sustained. By way of summarizing the arguments herein presented, and only the arguments herein presented, we refer to the three propositions presented as follows:

"The anti-trust laws of Texas are too vague and indefinite to be enforced."

The argument and authorities presented under this heading show that the anti-trust laws of 1899 and 1903, as construed herein, are equivalent to the enforcement of a statute which should enact, "If a jury shall find that two or more corporations or persons have heretofore entered into any agreement or combination reasonably calculated to, or which tends to fix the price of oil in Texas, the jury shall assess a punishment against said corporations or persons, or either of them, of not less than two hundred nor more than five thousand dollars for each day such agreement or combination is continued." It would be admitted that such a statute was void

on its face. Yet that was exactly what was done herein by the construction placed upon the statutes by the State courts.

Again we refer to the proposition that:

"The anti-trust laws of 1899 and 1903 and 1907, as construed herein, are ex post facto laws."

The argument and authorities presented under this heading show that the anti-trust laws of 1899 and 1903 and 1907 as construed herein are equivalent to the enforcement of a statute which should enact, "If a jury shall find that two corporations have heretofore entered into a lawful contract, or that one corporation has heretofore lawfully acquired vested property rights in the stock of another, and that either of said acts are reasonably calculated to fix, or tend to fix, the price of oil in Texas, and that one of said corporations continues to do business in Texas after this act takes effect, then the jury shall punish said corporation so doing business, by assessing penalties against it for each day it continues to do business, in an amount not less than, etc."

Such a statute as this, it will be admitted, is void upon its face. Yet this was the effect given the anti-trust laws of 1899 and 1903, and the Acts of 1907, fixing a lien in favor of the State and authorizing a receivership in a suit for penalties.

Again we refer to the proposition that:

"The anti-trust laws of the State of Texas of 1899 and 1903, and the Act of 1907, as construed and applied herein, are void because they authorize an assessment of excessive fines, penalties and punishment."

The assessment of a fine for $1,623,000 against Plaintiff in Error and the cancellation of its permit to do business in the State and the appointment of a receiver to take possession of its property were equivalent to the enforcement of a statute which should provide, "In the trial of the cause involving the violation of the laws prohibiting corporations from entering into agreements, or making combinations, reasonably calculated to fix the price of oil, or involving the holding of stock in one corporation by another, which stock was lawfully acquired, the jury may assess such penalties as will confiscate all of the property of the corporation vio-

lating said laws prohibiting such agreements and such combinations, or which permits another corporation to hold its stock lawfully acquired by said corporation, and the court in which the judgment is rendered may appoint a receiver to take charge of all of the property of such corporation, notwithstanding the fact that the judgment for penalties has been secured by a supersedeas bond." It will be admitted that such a statute would be void upon its face. Yet that was exactly what was accomplished by the enforcement of the statutes referred to by the proceedings and judgments below.

Now, we do not think that this statement of the result of the judgments below is exaggerated or overdrawn. A careful examination of the records in these two causes, we believe, will show that our statement of the legal effect and result of such judgments is entirely correct.

This is the Court of last resort in these cases. It is the last opportunity which the Plaintiff in Error will have to offer any objection to the taking of all of its property in the State of Texas, valued at more than a million dollars, and to the application of the same to the use and benefit of the State of Texas. It is the last time that it can be heard to present the question of the protection of its property rights against confiscation, in violation of the guarantees contained in the Constitution of the United States. It does not seem improper, therefore, for it to insist, earnestly, that each and every proposition submitted in its principal brief, and in this additional brief and argument, should be scrutinized and examined with the utmost care.

The questions involved are of such gravity, and of such far-reaching importance, not only to the Plaintiff in Error, but to all corporations and persons engaged in commerce in the United States, that counsel for Plaintiff in Error concluded that it was not only proper, but that it was incumbent upon them, in the discharge of their duties, to call attention as they have done to all the matters and things involved in this record, and the results thereof. In doing this they have not intended to depart in any manner from

the established rules and regulations for the presentation of questions in this Court. They have intended to give "full faith and credit" to the action of the State, its courts and its legal representatives, in all that has been done in these causes. They have not intended to impugn the personal motives of any one, or of any party. The purpose and intent has been to point out simply the legal errors which had been committed, and the results that would flow therefrom.

And, in view of the record, it is submitted that the judgments below are void, for the reasons assigned in this Court, and especially because the Plaintiff in Error has been punished for acts which it could not know were penal at the time they were committed, and has been punished for acts committed before the laws of the State referred to were enacted, and has been punished by the confiscation of its property, by excessive fines, penalties and seizures. For these reasons, it is submitted that the judgments in both causes should be reversed.

J. D. JOHNSON,
E. B. PERKINS,
Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED.
OCT 27 1908
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

Nos. 359 and 360.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF TEXAS, DEFENDANT IN ERROR.

ARGUMENT FOR PLAINTIFF IN ERROR.

H. S. PRIEST,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

NO. 359 AND NO. 360.

WATERS-PIERCE OIL COMPANY,
Plaintiff-in-Error,
vs.
STATE OF TEXAS,
Defendant-in-Error.

STATEMENT.

In 1899, the Legislature of Texas enacted a law in fifteen sections against pools, trusts and monopolies in trade which took effect January 31, 1900, the substantial provisions of which, so far as this cause is concerned, are comprised in Sections 1 to 8, which are as follows:

> "Section 1. Any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this State, or any partnership, or individual or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or the pre-

mium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act.

Section 2. A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, property assets, trade, custom, skill or acts, or of any other valuable thing or possession, by or between persons, firms or corporations, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a 'monopoly,' as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade, or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the

meaning of this act, if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly,' as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or association of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

Section 3. If any person, persons, company, partnership, association or corporation, engaged in the manufacture of any article of commerce or consumption from the raw material produced or mined in this State, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell at less than the cost of manufacture, or give away their manufactured products, for the purpose of driving out competition or financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished product produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction shall be subject to the penalties of this act.

Section 4. If any person, persons, company, partnership, association, corporation or agent engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured or mined in this State or elsewhere, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way, or give away within this State, their products for the purpose of driving out competition or financially injuring competitors engaged in similar business, said person, persons, company, partnership, association, corporation or agent resorting to this method of securing a monopoly within this State in such business, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction thereof shall be subject to the penalties of this act.

Section 5. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation

or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the state treasury, and to become a part of the general fund, except as hereinafter provided.

Section 6. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding any such article or thing aforesaid, it shall be a violation of this act; and any person, firm, corporation or association of persons committing such violation shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

Section 7. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this act, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in the State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other state or country, which shall violate any of the provisions of the preceding sections of this act shall there-

by forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in the State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State, has been, while acting as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act, shall be received as *prima facie* proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, to the Commissioner of Insurance, Statistics and History of the State, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation."

This act was repealed by an act which became effective March 31, 1903, the provisions of which substantially affecting this case are comprised in the first thirteen sections, which are as follows:

"Section 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the following purposes: 1. To create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State. 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any produce for market or transportation. 3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation. 4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise,

produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established. 5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected. 6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation. 7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.

Section 2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first

section of this Act. 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

Section 3. That either or any of the following acts shall constitute a conspiracy in restraint of trade: 1. Where any two or more persons, firms, corporations, or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity. 2. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

Section 4. Any and all trusts, monopolies and conspiracies in restraint of trade as herein defined, are hereby prohibited and declared to be illegal.

Section 5. Any corporation holding a charter under the laws of the State of Texas, which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

Section 6. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the Attorney-General, upon his own motion, and without leave or order of any judge or court, to institute suit or **quo warranto** proceedings in Travis County, at Austin, or at the county seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

Section 7. When a corporation organized under the laws of this State shall have been convicted of a violation of any of the provisions of this Act, and its charter and franchise has been forfeited, as provided in section 5, no

other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas.

Section 8. Every foreign corporation violating any of the provisions of this Act is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney-General to enforce this provision by injunction or other proceedings in the district court of Travis County, in the name of the State of Texas.

Section 9. The provisions of Chapter 92 of the Revised Statutes of this State of 1895, to prescribe the remedy and regulate the proceedings by **quo warranto,** etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this Act.

Section 10. When any foreign corporation has been convicted of a violation of any of the provisions of this Act, and its right to do business in this State has been forfeited, as provided in Section 8 of this Act, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations shall be permitted to incorporate or do business in Texas.

Section 11. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this Act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General, or the district or county attorney under the direction of the Attorney-General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this Act shall be over and above the fees allowed him under the general fee bill.

Section 12. Any contract or agreement in violation of the provisions of this Act shall be absolutely void and not enforcible either in law or equity.

Section 13. And in addition to the penalties and forfeitures herein provided for, every person violating this

Act may further (be) punished by imprisonment in the penitentiary not less than one nor more than ten years.

Under the provisions of these two acts, the Attorney-General of Texas and the County Attorney of Travis County of that State, on the 22nd of September, 1906, instituted a suit against the Waters-Pierce Oil Company to recover penalties under the Act of 1899, from the 29th day of May, 1900, until the 31st day of March, 1903, at the rate of five thousand dollars per day and under the Act of 1903 from the 31st day of March, 1903, until April 29, 1907, the date at which the last amended petition was filed, at the rate of fifty dollars per day.

The facts are: That in 1878 a Waters-Pierce Oil Company was organized to succeed the partnership of Waters, Pierce & Company, oil merchants of St. Louis. Its capital was one hundred thousand dollars, divided into one thousand shares of the par value of one hundred dollars each and was subscribed and owned, 40 per cent by Waters, Pierce & Company; 20 per cent by Chess Carley & Company; and 40 per cent by Hutchings & Thompson. In June, 1882, its capital was increased to four hundred thousand dollars and at that time its stock ownership stood: Hutchings & Thompson and Chess Carley & Company, 2,750 shares; H. C. Pierce, 1,250 shares. Subsequent to this time Hutchings & Thompson and Chess Carley & Company transferred their 2,750 shares to the trustees under what is generally known as the Standard Oil Trust Agreement of January 2, 1882, which we will later refer to. Mr. Pierce continued to own his shares up to the date of the dissolution of the company in May, 1900, and from the date of the organization of the company down to the date of its dissolution, managed and controlled its affairs.

When this company was first organized, it was distinctly agreed that its management should be conducted by Mr. H. C. Pierce who was then an experienced oil merchant, familiar with the trade and territory to which its business was to be confined, and this agreement was complied with until the dissolution of the company at the time above stated. The territory which this company was organized to develop and serve was a small

part of Illinois, a part of Louisiana, and practically all that part of Missouri south of the Missouri River, Arkansas, Texas the Indian Territory and the Republic of Mexico. The oil business was then comparatively new and insignificant and the territory allotted to this company practically undeveloped in the oil trade. The business, in the opinion of the management of the company required great detail in facility for merchandising and watchfulness in upbuilding the business. To encourage the purchase of oil and popularize it and make its merchandise convenient and easy and to economize in the cost, the company, under Mr. Pierce's management, acquired tank cars for transporting the oil in bulk from the refineries to distributing stations where large local tanks were built to receive it in bulk; provided tank wagons in which to locally distribute oil in large or small quantities to dealers within a radius of ten to fifteen miles; and contrived iron barrels to ship to longer distances that could not be reached by wagon wherein the evaporation of oil would not take place and thereby occasion loss to the merchant—in short, every convenience that would administer in the economy of handling the oil, both to the consumer and its customers, and cheapen its use was instituted and enlarged upon as the business grew in proportions and the population of the territory in which its plant was constructed increased. By reason of these facilities and the increase in the population of this territory, the company's business grew from the sale of a few hundred thousand barrels at the date of its organization into millions of barrels before its dissolution.

This company was never a manufacturing or refining company in the United States. The only sources from which it could get in quantity and quality with promptness the oil necessary to supply its customers was the Standard Oil Company of Ohio and its successors in the refining business. From 1892 until the dissolution of the company its directorate consisted of Mr. Pierce, Mr. Findley, Mr. Pierce's brother-in-law, Mr. C. M. Adams, who had been with the company nearly all of its corporate life as an employee, Mr. Gruet, who had been employed by Mr. Pierce, and Mr. H. M. Tilford who resided in

New York. The home office of the company was at all times located at St. Louis and its business managed and ordered from there.

In 1900 a suit, which had been brought against this company by the State of Texas for the cancellation of its license to do business there because of a violation of some provision of the Anti-Trust Law of that State, culminated in a final judgment against it. This proceeding was based upon the acts of some of the agents of the company in making so-called exclusive contracts with local dealers which were held to be forbidden by the laws of Texas.

The Waters-Pierce Oil Co. v. Tex., 177 U. S., 28.

Thereupon, on the 28th day of May, 1900, this company was dissolved and a new company with the same name was, on the 29th day of May, 1900, organized under and pursuant to the laws of the State of Missouri. It was organized with a capital of four hundred thousand dollars by Mr. Pierce who subscribed and paid for the entire issue of stock. It took over all the property of the old company and gave notes in payment therefor which were subsequently honored at maturity.

At the time of the dissolution of the old Waters-Pierce Oil Company, the Standard Oil Company of New Jersey had acquired the 2,750 shares which had previously been owned by Hutchings & Thompson and Chess Carley & Company and their successors, the trustees under the Standard Oil Trust Agreement of January 2, 1882. It is not pretended that Mr. Pierce did not consult the owner of the majority of stock in disposing of the property of the old company and its acquisition by the new. Counsel reported to Mr. Pierce, after a consultation with counsel representing the larger interests, that it had been understood that if the Standard Oil Company should retain the same interest in the new company it had in the old, it could do so, and accordingly, in the following September, Mr. Pierce transferred to it in blank the same number of shares in the new company that it had held in the old with the understanding that the shares should remain in his name on the stock book so as to give him the technical as well as the actual control of the company.

After the new company was organized its affairs and policies were managed by an executive committee at St. Louis, composed of Mr. Pierce, Mr. Findley, Mr. Pierce's brother-in-law, Mr. Adams, who had been employed by Mr. Pierce in the old company, Mr. Gruet, who had also been employed by Mr. Pierce in the old company, Mr. Johnson, general counsel, who had been Mr. Pierce's personal attorney, Mr. Johnson, Mr. Pierce's brother-in-law, and Mr. Ackert, a relative of Mr. Pierce. Neither the old nor the new Waters-Pierce Oil Company was ever a producer or refiner of oils in the United States, but acted as merchant for the brands of oil which had been established by the old company, and were manufactured for it and the new company by the refineries of the Standard Oil Company; both of them refined in Mexico oils which were sold there from crude oils which were purchased from the Standard Oil Company.

Mr. Pierce owned no stock or other interest in any oil producing or merchandising company other than the Waters-Pierce Oil Company. His business life had been devoted to developing and building up the business and trade of the Waters Pierce Oil Company, and during all of the time of its existence he was the principal manager and director of its affairs and controlled its policies. Because of the large volume of business between the Standard Oil Company and the Waters-Pierce Oil Company, there was of necessity a great volume of correspondence between the St. Louis officers of the Waters-Pierce Oil Company and those of the Standard Oil Company at 26 Broadway, New York. This correspondence related to business dealings between the two companies of such character as would usually take place between persons engaged in constant trade as manufacturer and merchant. The Standard Oil Company of New Jersey was an owner of a little more than a two-third interest in the Waters-Pierce Oil Company, and had a just and legal right to be informed from the offices of the latter, or through appointed agents, of the financial and business condition of the Waters-Pierce Oil Company. The testimony is clear, conclusive and positive that, as to the purchasing of

oil and the sale of oil in its territory, the Waters-Pierce Oil Company's management was entirely independent of any control or agreement between it and the officers of the Standard Oil Company or any other company whatsoever. It was neither claimed nor proven that the Waters-Pierce Oil Company of 1900, since its organiztion, had combined or confederated with any person or corporation, either in Texas or elsewhere, to fix or maintain the prices of any commodities in which it dealt or became a member of any trust or pool through which it shared in the earnings of any competitor, or that in any manner or form it sought to limit or control the output of any commodities in which it dealt.

The most important claim of infraction of either the Acts of 1899 or 1903, is that the Standard Oil Company of New Jersey owned about 60 per cent. of the shares of its capital stock.

This plainly will appear from the charge of the court to the jury and the evidence. During the course of the trial, against the defendant's objections, the State offered in evidence an agreement commonly called the Standard Oil Trust Agreement, dated the second day of January, 1882, made "Exhibit A" to the bill and an agreement supplemental thereto, marked "Exhibit B." It was agreed that the Waters-Pierce Oil Company did not sign this agreement, neither did Mr. Pierce nor was Mr. Pierce's stock ever deposited under the agreement.

The Standard Oil Company could not do business in Texas without a permit. It never did any business in Texas and never applied for a permit to engage in business there. It was always a refining company from which the Waters-Pierce Oil Company purchased its supplies.

The petition of the State of Texas charged that the Waters-Pierce Oil Company had conspired with John D. Rockefeller, John D. Archbold, Henry M. Flagler and a number of other persons and corporations on, or about January 1st, 1870, for the purpose of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States and in the State of Texas; that the predecessor of this plaintiff-in-error, the (old) Waters-

Pierce Oil Company, incorporated in 1878, had become a party to said conspiracy, and had entered into contracts with certain corporations and individuals engaged in the business of selling petroleum and the products thereof in the State of Texas by the terms of which said plaintiff-in-error acquired the properties of said individuals and corporations, all for the purpose of monopolizing the business of selling petroleum and the products thereof within said State and suppressing competition therein. Said petition further alleged that the said Waters-Pierce Oil Company, plaintiff-in-error, had entered into an agreement with the Standard Oil Company, a corporation organized under the laws of New Jersey, for the further purpose of monopolizing the trade in petroleum and the products thereof in the State of Texas; and, for the further purpose of carrying out said contract and conspiracies, had permitted the said Standard Oil Company to acquire a majority of the shares of stock of the said Waters-Pierce Oil Company and had thereby transferred the management and control of the said Waters-Pierce Oil Company to the said Standard Oil Company of New Jersey; that the Waters-Pierce Oil Company, plaintiff-in-error, not only succeeded to all the property of its predecessor, the Waters-Pierce Oil Company, which voluntarily dissolved May 29, 1900, but also assumed all the contracts and agreements of said predecessor, especially those above referred to, with the Standard Oil Company of New Jersey and other corporations and individuals; and that said plaintiff-in-error had effected a mere nominal reorganization for the purpose of perpetrating a fraud upon the State of Texas, and to enable the company to maintain its business in said State, and that the permit of said plaintiff-in-error to do business in Texas was fraudulently obtained. Said petition further charged that the said Waters-Pierce Oil Company was dominated and controlled in its business by the Standard Oil Company of New Jersey; that through the contracts and conspiracies aforesaid a large number of individuals and corporations doing business in the sale of oil and petroleum products were excluded from doing business within said State, whereby competition was

suppressed and destroyed and a substantially complete monopopoly in petroleum products established. Said petition further alleged that said acts, conspiracies and agreements were done, continued and performed by plaintiff-in-error upon each and every day from the 31st day of May, 1900, to the 31st day of March, 1903, in violation of the Anti-Trust Act of 1899, and from the 31st day of March, 1903, up to the time of bringing this suit upon each and every day within said period in violation of the Anti-Trust Act of 1903. (Transcript, pp. 1 to 39.)

To the petition of the State of Texas, plaintiff-in-error made answer by general and special exceptions, general denial and certain special pleas wherein plaintiff-in-error denied the constitutionality of said Acts of 1899 and 1903 in so far as it was sought thereunder to hold plaintiff-in-error liable for the acts and things alleged and charged in said petition, and further defended that if the petition of the State of Texas and the prayer therein should be granted, this plaintiff-in-error would be denied the equal protection of the laws, be subjected to **ex post facto** laws, deprived of its property without due process of law, and have the obligation of its contracts impaired, all contrary to the express provisions of the United States Constitution. (Transcript, pp. 43 to 95.)

Trial was had at the May Term, 1907, of the District Court of Travis County, Texas, resulting, on June 1st, 1907, in a verdict in favor of said State of Texas and against this plaintiff-in-error for the sum of $1,623,900.00, and cancelling said permit of plaintiff-in-error to do business in the State of Texas, whereupon said District Court of Travis County, Texas, entered judgment in accordance with said verdict, that the State of Texas have and recover from plaintiff-in-error herein the sum set forth in said verdict, with interest and cost of suit and did order and decree that the permit of the said Waters-Pierce Oil Company, plaintiff-in-error, to do business in the State of Texas be cancelled and that the said Waters-Pierce Oil Company be perpetually enjoined and prohibited from doing any and all business, except interstate business, within the State of Texas. (Transcript, pp. 334 and 335.)

In due time, plaintiff-in-error filed its motion for a new trial, which motion was overruled by said District Court, whereupon plaintiff-in-error excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas. (Transcript, pp. 315 to 320.)

Subsequent to overruling the above motion for a new trial and before plaintiff-in-error had given its **supersedeas** appeal bond from said judgment against it, said District Court, upon motion of the State of Texas, filed in the main case, appointed a receiver of the property, assets and business of said Waters-Pierce Oil Company, situate in the State of Texas, to which action of said court this plaintiff-in-error duly excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. (Transcript, pp. 327 to 328.) The Court of Civil Appeals affirmed the judgment, decree and orders of the court below. (Transcript. p. 1162.)

In due time plaintiff-in-error filed with the Supreme Court of Texas its application for a writ of error to said Court of Civil Appeals, which said application was on February 26, 1908, refused by said Supreme Court of Texas. (Transcript, p. 1187.)

Whereupon, said Waters-Pierce Oil Company, plaintiff-in-error herein, applied for and obtained from this court a writ of error to said Court of Civil Appeals to review its judgment upon assignments of error which are substantially in part epitomized under the title of Points and Authorities.

POINTS AND AUTHORITIES.

1. The Waters-Pierce Oil Company cannot be held liable and punished for the acts or engagements of the Standard Oil Company which it was under no legal duty to examine and could neither order, forbid nor control.

Capitol Traction Company v. Offutt, 17 App. D. C. 292; 53 L. R. A. 390;
Durkin v. Kingston Coal Company, 171 Penn. 193; 29 L. R. A. 808;
U. S. Const., Sec. 10, Article I.
U. S. Const., Sec. 1, 14 Adm.

(*a*) The capacity of the Standard Oil Company to acquire and hold the stock of the Waters-Pierce Oil Company must be determined by its charter, and the conditions of subscription and the nature of certificates of stock according to the law of the State wherein said Waters-Pierce Oil Company was created, to-wit: the State of Missouri, and not the State of Texas.

Black v. Zacharie, 3 Howard, 483;
Meramec Mining Co. v. Levy, 54 Penn. State, 227; 93 Am. Dec. 697;
Ireland v. Globe Milling & Reduction Co. (R. I. 1895); 32 Atl. 921;
Greenwood v. Curtis, 6 Mass. 358;
Boatmen's Bank v. Gillespie, 209 Mo. 217, l. c. 256;
Trust & Savings Co. v. Home Lumber Co., 118 Mo. 459;
Bank v. Durfee, 118 Mo. 442;
Watson v. Woody Printing Co., 56 Mo. App. 151;
O'Brien v. Cummings, 13 Mo. App. 197;
Carroll v. Savings Bank, 8 Mo. App. 249;
U. S. Const., Sec. 1, 14 Amd.

(*b*) If the holding of stock by the Standard Oil Company of New Jersey in the Waters-Pierce Oil Company was unlawful,

it was an offense on the part of the holding company, and not of the company whose stock was so held, the acquisition of which it could neither lawfully forbid nor prevent.

Texas Anti-Trust Act, 1903, Sec. 2;
Northern Securities Co. v. U. S., 193 U. S. 197;
U. S. Const., Sec. 1, 14 Amd.

(*c*) **In declaring it unlawful for the Standard Oil Company to own stock in the Waters-Pierce Oil Company, the latter is not only deprived of its property without due process of law, and denied the equal protection of the laws, but such directly impairs the obligation of a contract, in that it denies a stockholder of the Waters-Pierce Oil Company the right to transfer his stock to whom he pleases.**

Trisconti v. Winship, 43 La. An. 45; 26 Am. St. Rep. 175.
McNulte v. Corn Belt Bank, 164 Ill. 427; 56 Am. St. Rep. 203;
Weston's Case, L. R. 4 Ch. App. 20;
Farmers' Loan & Trust Co. v. C. P. & S. Ry. Co., 163 U. S. 31;
Rice v. Rockefeller, 134 N. Y. 174; 30 Am. St. Rep. 658.

2. **To punish the Waters-Pierce Oil Company because part of its stock was held by the Standard Oil Company, the same having been acquired long before the passage of the Texas Anti-Trust Acts of 1903 and 1899, and when such acquisition was wholly lawful, is to subject the Waters-Pierce Oil Company to an *ex post facto* law and deprive it of its property without due process of law.**

U. S. Const. Sec. 10, Article 1;
U. S. Const. Sec. 1, 14th Amd;
Calder v. Bull, 3 Dallas, 386;
Fletcher v. Peck, 6 Cranch, 87;
Watson v. Mercer, 8 Peters, 88;
Coffin v. Rich, 45 Maine, 507;
American Building & Loan Assn. v. Rainboat, 48 Neb. 434;

Stevens v. Southern Pacific Co. 109 Calif. 86; 41 Pacific 783; 29 L. R. A. 751.

(*a.*) **The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.**

Huntington v. Attrill, 146 U. S. 657;
Wisconsin v. Pelican Ins. Co., 127 U. S. 265;
Boyd v. U. S., 116 U. S. 616;
Lees v. U. S., 150 U. S. 476;
U. S. v. Shapleigh, 54 Fed. Rep. 126;
Burgess v. Salmon, 97 U. S. 381;
U. S. v. Hughes, Fed. Cases No. 15,416;
Wilson v. Ohio Railroad Co., 64 Ill. 542;
Cooley, Const. Lim. (7th Ed.) p. 375. ff.

3. **The State of Texas cannot constitutionally enact a law which denounces as an offense an act committed in another state, and punish this plaintiff-in-error for an alleged offense, committed wholly outside of the jurisdiction of the State of Texas.**

The Appollon, 9 Wheaton, 362;
State v. Knight, (N. C., 1799) Taylor, 65;
In re Grice, 79 Fed. Rep. 627;
State v. Cutshall, 110 N. C. 538; 16 L. R. A. 130;
Allgeyer v. La. 165 U. S. 578;
Southerland, Stat. Const. (Lewis' edition) Vol. 1, Sec. 13;
Cooley, Const. Lim. (7th Edition) Page 176;
Story, Conflict of Laws, (1834) Sec. 620.

4. **The Waters-Pierce Oil Company cannot be held liable because of any alleged agreement between its predecessor, the old Waters-Pierce Oil Company, and the Standard Oil Company of New Jersey, solely on account of the purchase by the present Waters-Pierce Oil Company of its predecessor's business, property and good-will.**

Capitol Traction Co. v. Offutt, 17 App. D. C. 292; 53 L. R. A. 390;

Austin v. Tecumseh Nat'l. Bank, 49 Neb. 416; 68 N. Western, 628; 35 L. R. A. 444;
Wyman v. Hallowell, 14 Mass. 57; 17 Am. Dec. 194;
Bellows v. Hallowell & Augusta Bank, 2 Mason 31; Fed. Cases, 1279;
Gulf, Colo. & S. S. Railroad Co. v. Newell, 73 Texas, 334; 15 Am. State Rep. 788;
Houston Ice & Brewing Co. v. Stratton, 13 Tex. Cr. Rep. 887; 89 Southwestern 1111;
U. S. Const. Sec. 1, 14th Amd.

5. **Admitting the ownership of a portion of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey, this fact is not enough to establish the existence of a "combination" between the two corporations, within the meaning of that term as used in the Texas Anti-Trust Acts of 1899 and 1903, and to hold the Waters-Pierce Oil Company because of such ownership of stock by the Standard Oil Company guilty of entering into a combination with the Standard Oil Company, and punishing it therefor, is to deprive the Waters-Pierce Oil Company of its property without due process of law, deny it the equal protection of the laws, and hold it liable under *ex post facto* and retrospective laws.**

Commonwealth *ex rel.* v. Ponxsutawney Waterworks Co., 197 Pa. Stat. 569; 47 Atlantic, 843;
Gates v. Hooper, 90 Texas, 563; 39 Southwestern, 1079;
State v. Continental Tobacco Co., 177 Mo., 1; 75 Southwestern, 737;
U. S. Const. Sec. 1, Article 4;
U. S. Const. Sec. 10, Art. 1;
U. S. Const. Sec. 1, 14th Amd.

(*a*) **Nor does the fact of such ownership of a portion of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey warrant the conclusion that the Waters-Pierce Oil Company had brought its management and control under the management and control of the Standard Oil Company.**

6. **In the admission of incompetent, frivolous and immaterial evidence wholly foreign to any issues to the cause, arbitrarily admitted and without regard for the rules of law and constitutional rights of plaintiff-in-error to a fair and impartial trial of the issues raised, said evidence being calculated to excite, inflame and prejudice the minds of the jury against said plaintiff-in-error, the constitutional right of plaintiff-in-error to a fair and impartial trial was denied, and by the judgment upon the verdict in said cause plaintiff-in-error was deprived of its property without due process of law.**

Robinson, Am. Jurisprudence, Pages 238 to 57 to 59;
In re Ziebold, 23 Fed. Rep. 791;
Ex parte Va. 100 U. S. 346;
Bank of Columbia v. Oakly, 4 Wheaton, 235;
Cooley, Const. Lim. (7th Edition) Page 506;
Utah v. Bates, 14 Utah, 293; 47 Pacific 78; 43 L. R. A. 33;
San Jose Ranch Co. v. San Jose Land & Water Co., 126 Calif. 322; 58 Pacific, 824;
Pennoyer v. Neff, 95 U. S. 714;
U. S. Const. Sec. 1, 14th Am.

7. **The fine imposed is so grossly excessive as to deprive plaintiff-in-error of its property without due process of law.**

Cooley, Const. Lim. (7th Edition) Page 471;
Cutting v. Goddard, 183 U. S., l. c. 101;
Gates v. Hooper, 90 Texas, 563;
State v. Compress Co. 95 Texas, 603;
Ft. Worth & D. C. R. R. Co. v. State (Texas) 87 Southwestern, 336;
State v. Bates, 14 Utah, 293, 47 Pacific, 78, 43 L. R A. 33;
Texas Const. Sec. 13, Article 1;
U. S .Const. Sec. 1, 14th Amd.

(*a*) **In including penalties for Sundays, in the absence of proof showing the doing of business on such days, plaintiff-in-error is denied due process of law.**

8. **The Texas Anti-Trust Acts of 1899 and 1903 are so vague, indefinite, ambiguous and uncertain in terms as to fail to designate any offense with such certainty as to inform the public in advance of the constituents of the offense sought to be defined and punished, and the punishment of this plaintiff-in-error under said statutes deprives it of its property without due process of law.**

Augustine v. State (Texas), 52 Southwestern, 77;
Queen Ins. Co. v. State, 86 Texas, 250;
M. K. & T. Ry. Co. v. State (Texas), 100 Southwestern, 766;
Tozier v. U. S., 52 Fed. Rep. 917;
L. & N. Railroad Co. v. Commonwealth (Ky.), 35 Southwestern, 129;
Hughes Criminal Law, Sec. 2429;
Commonwealth v. Bradford, 9 Metcalf, 268;
Cutter v. State, 36 New Jersey Law, 125;
C. B. & Q. Railway Co. v. Chicago, 166 U. S. 226;
Hagar v. Reclamation District, 111 U. S. 701;
Niagara Fire Ins. Co. v. Cornell, 110 Fed. Rep. 816;
U. S. Const. Sec. 1, 14th Amd.

9. **The denial of any period of limitation in bar of a suit against plaintiff-in-error to recover fines or penalties or forfeit its permit is a denial of the equal protection of the laws, and deprives plaintiff-in-error of its property without due process of law.**

G. C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Cutting v. Goddard, 183 U. S. 79;
Ex parte Converse, 137 U. S. 624;

Under Article 219, Texas Code of Criminal Procedure;
Klepper v. State, 4 Texas, 242;
Cyc. Vol. 22, Page 186;
Stucksbury v. Swan, 85 Texas, 563;
M. K. & T. Ry. Co. v. State (Texas), 100 Southwestern, 766;

Commonwealth v. Equitable Life Assurance Co. (Ky.); 38 Southwestern, 491;
U. S. v. Shapleigh, 54 Fed. Rep. 134;
Ex parte Lange, 18 Wallace, 163.

Under Article 3354 Revised Civil Statutes of Texas;
Stockwell v. U. S. 13 Wallace, 531;
Davidson v. Mo. Pac. Ry. Co. (Texas), 3 Willson's Cases, 216;
Lockwell v. Ohio, 11 Ohio, 130;
Buswell on Limitation. Sec. 97.

Under Article 3358, Revised Civil Statutes of Texas;
Boswell v. Robinson, 33 New Jersey Law, 273;
Cooper v. Lee, 75 Texas, 114; 12 Southwestern, 483;
Tevis v. Armstrong, 71 Texas, 59;
Railway v. Titterington, 84 Texas, 218;
Blount v. Bleker, (Texas), 35 Southwestern, 863.

10. **The appointment of a receiver and transfer to him of the property of plaintiff-in-error pending proceedings by way of appeal was wholly without authority and an arbitrary exercise of judicial power, and deprived plaintiff-in-error of its property without due process of law, and denied it the equal protection of the laws.**

Pomeroy, Equity Jurisprudence, Sec. 1330 and Equitable Remedies, Sections 62, 118, and 71;
Ry. Co. v. Jackson, 85 Texas, 605;
Havemeyer v. Superior Court, 84 Calif. 327; 24 Pacific, 121, l. c., 134, 135;
Revised Statutes of Texas, Articles 1177, 1181, 1191 and 1337;
Hall v. Jackson, 3 Texas, 305;
Nye v. Gribbell, 70 Texas, 458;
May v. Taylor, 22 Texas, 348;
Mann v. Falcom, 25 Texas, 276;
Bledsoe v. Wills, 22 Texas, 650;
U. S. Const. Sec. 1, 14th Amd.

(*a*) **The appointment of a receiver of plaintiff-in-error's property for the purpose of depriving it of the capacity for further or continued violation of the anti-trust laws of Texas without evidence of any such intended violation, and without evidence that it could not use its said property in compliance with law, constitutes a deprivation of said property of plaintiff-in-error without due process of law.**

Windsor v. McVeigh, 93 U. S. 274;
Ex parte Lange, 18 Wallace, 163;
Bigelow v. Forrest, 9 Wallace, 351;
Hovey v. Elliott, 167 U. S. 409.

11. **The Texas Act of April 11th, 1907, is null and void.**

(1.) **In so far as it attempts to create a lien upon the property of plaintiff-in-error for acts committed before said Act took effect.**

(2.) **In so far as under it, the right to appoint a receiver is limited to suits against corporations only.**

(3.) **In so far as it attempts to create a lien upon the property of plaintiff-in-error, in that the lien is not created by the terms of the act, based alone upon the commission of the offense, but is left to be created by the action of the prosecuting officer in filing suit to recover the prescribed penalties.**

Calder v. Bull, 3 Dallas, 388;
Cummings v. Missouri, 71 U. S. 277;
Fletcher v. Peck, 6 Cranch, 137;
Wilson v. O. & M. Railroad Co., 64 Ill. 542; 16 Am. Rep. 565;
Havemeyer v. Superior Court, 84 Calif. 347; 24 Pacific, 121;
Jackson v. Trunk Railroad Co., 85 Texas, 605;
G. C. & S. F. Railroad Co. v. Ellis, 165 U. S. 150;
Mayor of Baltimore v. Radecke, 49 Maryland, 217; 33 Am. Rep. 239;
Yick Wo v. Hopkins, 118 U. S. 266;
Barbier v. Connelly, 113 U. S. 27.

ARGUMENT FOR PLAINTIFF-IN-ERROR.

It would appear to be appropriate and important at the beginning of the discussion of this case to examine and endeavor to comprehend the enactments of the legislature under which this proceeding was instituted. We will, therefore, consider the text of the Act of 1899 and the text of the Act of 1903 so far as the several provisions of those acts may be involved in this case.

The first and second sections, only, of the Act of 1899 are important now to be analyzed. There is no claim made against plaintiff-in-error that it has done anything which would violate the provisions of sections three, four and six of that act. The third section prohibits a manufacturer in the State of Texas from selling his products at less than cost or giving them away for the purpose of driving out competition or financially injuring competitors. And the fourth section prohibits such acts whether the product be manufactured in the State of Texas or elsewhere.

The sixth section prohibits two or more persons engaged in trade from entering into any pool, trust, agreement or combination to control or limit trade or to limit competition in trade by refusing to buy or sell to any person for the reason that such other person is not a member of or a party to such pool, trust, etc., from boycotting any person who is not a member of or a party to such pool, trust, etc.

As we said before, the important sections of this act are one and two because they are the ones upon which the petition is based and the charge of the court to the jury is predicated. Section one prohibits any person, partnership or corporation transacting business in the State of Texas from forming, entering into or becoming a party to any pool, trust, agreement, combination, confederation or under-

standing with any other person, partnership or corporation to regulate or fix the price or maintain the price when so regulated or fixed or to fix or limit the amount or quantity of any article or thing whatsoever.

It is to be noted, first, that the text of this act recognizes the legally established integers of trade; it recognizes the individual and the association of individuals in the legal form of partnerships, limited partnerships, joint-stock companies and corporations. It does not recognize the capacity of one of an association in the partnership or a shareholder in a joint stock company or a corporation to do the things forbidden by the act. Hence, it does not authorize an inquiry into the previous business relation or status of the members who may form a partnership or of the members of a joint stock company or the shareholders of a corporation. It accepts for the purposes of this prohibition the partnership in its legal unity and the corporation in its corporate entity. It authorizes no inquiry behind this legal structure. For the purpose of applying this statute, the individual, without his past associations, the partnership, without the past affiliations of those who constitute it, and the corporation, without the previous relation or attitude of its shareholders, must be taken as the beginning and the end of the court's inquiry. If a partnership, as a partnership, has not contracted in the prohibited respect with another person, partnership or corporation; if a corporation, taken as a legal entity, has not affiliated with another individual, partnership or corporation, in the manner prohibited by the statutes, then, there can be no application of the penalties whatever may have been and whatever may be the relation of the different elements which form these composite bodies. This is a penal statute. Its terms cannot be extended by construction. Its purposes must be enforced within the meaning of the text. It is as much beyond the power of a court to extend, by construction, the penal provisions of a

law as it is to create by judicial pronouncement an offense which had no existence by legislative authority.

Secondly, it will be observed that the things prohibited by these legally recognized and responsible integers are those things which require active and purposeful volition. The things prohibited cannot be done by omission or inadvertently.

"Contract" or "agreement" requires active co-operation and concurrence of minds of the parties engaging in the contract. "Understanding" is an informal contract or engagement and requires the same intellectual operation and assertiveness as contract or agreement. "Combination," "confederation" and "conspiracy" exact a knowledge of the thing to be done and an intellectual participation in the purpose to accomplish the end agreed upon. "Create and enter into" require conscious action. One cannot create a pool or trust or become a member of one without a conscious intention to do so. So that it must appear from the very language of this section that no one can be charged with guilt under it unless that person knowingly, consciously and wilfully commits the act prohibited by it.

The act does not define "pools" and "trusts." We are left, therefore, to construct our own definition of these two words. We think a "pool" means a combination intended by concerted action to make, regulate or control changes in market rates through a combination of the interests of several otherwise competing parties in which all take common ground as regard the public and distribute the profits of the business among themselves according to special arrangement.

A "trust" means an organization for the control of several corporations engaged in substantially the same business under one direction through the device of a transfer by the stockholders of each corporation of at least a majority of the shares of stock to a central committee or a board of trustees (who issue in return to such stockholders, re-

spectively, certificates showing that although they have parted with their stock and consequent voting power, they are still entitled to dividends or shares of the profit) so as to enable the trustees to elect the directors in all the corporations and through them regulate production and defeat competition.

The question then naturally follows: How may an individual, partnership or corporation do those things which would invoke the penalties of this act? Of course any individual competent to make a contract or do a criminal act might by doing the prohibited things subject himself to the penalties of this law. A member of a partnership, acting within the scope of the implied delegation of power given by each member of the firm to the other, might be committed by the conduct or action of any member of the firm. A corporation can only act legally: through its shareholders, its constituent assembly, under the authority of its by-laws and charter, or its board of directors or its authorized officers and agents acting within the scope of their delegated authority. Whatever, then, any of these parties may do acting in their authorized relation to the corporation must be held to be the act of the corporation, but in no other manner can the corporation be bound by their acts or conduct. No act of a shareholder, merely as a shareholder, who may own as much as three-fourths in value of the stock, can be potent to bind the corporation or strike down the interest of the remaining one-fourth.

We, therefore, say the true meaning of this section is: That before there can be guilt there must be a conscious, wilful commission of one of the prohibited things by the individual, by the partnership or by the corporation, as recognized legal integers in such capable manner as in law authoritatively binds. There is no authority in the act to go behind the partnership, the joint stock company, the corporation to visit upon them the sins, if any, of a part or all of their individual constituents. There is no provision for vicarious punishment.

The second section attempts to define and denounce a monopoly. The first clause of this section defines a monopoly to be any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill or acts by or between persons, firms or corporations or association of persons, firms or corporations "whereby any one of the **purposes** or **objects** mentioned in this act is accomplished or sought to be accomplished or whereby any one or more of said **purposes** are promoted or attempted to be executed or carried out or whereby the several **results** described herein are reasonably calculated to be produced."

So far this section is so uncertain and indefinite as to be unintelligible; and this defect, as we will perceive, is not cured by the luxurious verbiage of the latter part that attempts to elucidate the definition and add further provisions.

An act may be so uncertain and indefinite as to be no law. (State v. Ry. Co., 146 Mo. 155.) The words "purposes or objects mentioned in this act" and the words "results described herein" seem to be intended to be construed as synonyms. It is rather impossible to say whether coupled as they are by the disjunctive conjunction "or," they were intended to signify different things or the latter was intended to be definitive of the former. There are no "purposes or objects" proclaimed in the act, neither are there any "several results" described in the act. Certain things are prohibited in the act, but the act itself does not describe any "purposes or objects" which are sought to be accomplished by it nor is there the faintest resemblance to a description of "several results" in the act. If the words "purposes or objects mentioned in this act" and the words "results described herein" are to find any sort of relationship in the act, it must be in the first section which prohibits agreements, trusts or pools to fix and regulate the price and quantity of commodities and the results which would impliedly follow from such prohibited acts. But this would

add nothing to the efficiency of section one. It also denounces acts reasonably calculated to produce the "results described herein" or promote the purposes "mentioned in this act."

How far back we may go in the chain of causation in search of a cause reasonably calculated to produce a "result" described in the act or "promote" the "purposes mentioned in the act" is not indicated to us or how we may determine that such cause when discovered is direct or collateral, efficient or inefficient to produce the results is not avouched to us. Exactly in what line of reasoning the minds called upon to determine this important fact shall travel without straying is not assured to us. That different minds viewing the same concatenation of events might reach different conclusions as to its productive results does not seem to have occurred to the draftsman of this paragraph. Any union of capital, of credit, of property, of skill or acts between persons, firms or corporations whereby, if we are permitted to conjecture, the price or quantity of any commodity is fixed or limited or promoted or attempted to be executed or carried out is a monopoly; that is to say, endeavoring to extract some meaning from this mass of verbiage, if two individuals dealing in groceries in a single town should merge their capital into a partnership, such union would be denominated by this act a monopoly and the parties forming it, criminals. If two men engaged as painters, as artists, as sculptors in the same town should unite their skill in a partnership, they would have created a monopoly under this act. If two lawyers for the sake of economizing office rent should merge their professional fortunes into a partnership, they would have established a hateful monopoly under this act.

But the draftsman of this act, not being quite sure that he had covered sufficient ground by his definition, not feeling satisfied that he had been all-comprehensive in establishing a complete individualistic relation and entirely

destroying every possibility of business and intellectual co-operation, continues his definition by saying, a monopoly as thus "defined and contemplated" means so and so. How are we to determine the "contemplation" of the draftsman of this act except by what he says? And what he says is as nearly incomprehensible to us as the things he seems to contemplate and quite as absurd.

The last clause, professedly explanatory of the section, includes within the definition of monopoly all "aggregations," "affiliations" and "incorporations" of capital, skill, credit, "assets" property 'that **have been** or may be" created "for any one or more of the purposes named in this act."

We have just seen that the only "purposes" possible to extract from this act are those prohibitions mentioned in section one and by such reference no additional force or more comprehensive scope is given to the section. This provision is declaredly *ex post facto* or retroactive. It destroys partnerships previously innocuous and dissolves corporations lawfully existing by its fiat. So that if this section is to be given any meaning that meaning can only be held to refer to and reaffirm the prohibitions contained in section one. As to a status legally fixed and acts done, it is plainly retrospective and *ex post facto*. If it is to be taken independently of section one, it is palpably inefficient for the imposition of penalties because no one can be condemned by any law so indefinite that he may not read and know his guilt before a judge or jury coins it of their conception of what is and what is not the reasonable sequence of acts or the cause of events, in the midst of such complex factors.

THE ACT OF 1903.

This act became effective on March 31, 1903. It manifests a very decided change of legislative understanding of many words and definitions employed in the Act of 1899,

which we have just considered, and still it is far from affording a definition which defines.

The first three sections of the act are the only ones which have to do materially with this case. The first section in seven paragraphs defines a trust; the second in two paragraphs defines a monopoly and the third in two paragraphs conspiracies in restraint of trade.

Turning now to section one, the preliminary clause mentions those who shall be capable under the act of doing the things prohibited by the act. It defines a trust to be a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons or either two or more of them for the certain named purposes. It does not say that an individual within himself, a firm within itself or a corporation within itself shall be capable of violating the prohibitions of the section. It accepts the individual as he is, the partnership as it is, and the corporation as it is. It justifies no inquiry into the personal constituency of either of these associations. It imposes no conditions or limitations upon the capital or powers of corporations within themselves, either foreign or domestic, that does not exist by the law of their being. Every corporation in its legal integrity and with its charter powers is fully and completely recognized and no authority is conferred for an examination into its antecedents or the antecedents of its constituency. Its legal existence under the law of its creation is as completely acknowledged and immune from attack as is the existence of a natural person with his acquirements and faculties. Each is recognized, so far as the prohibitions of the law are concerned, as single, individual integers. It only authorizes an inquiry into its relation as a vital entity, not dismembered, to another natural person or corporation. This act was not intended to prevent either formation of partnerships or corporations, in the creation of each of which there is an element of combination, or the purchase by one firm of the assets of an-

other or, when not prohibited, the purchase by one corporation of the assets of another in the lawful pursuit of its business, in which there is to a certain extent a diminution of competition. The purpose was to prevent either individuals or corporations, engaged in the same business, maintaining towards the public an independent business attitude though in fact bound by secret agreement which destroyed all competition between them.

What we have said of the first section of the Act of 1899 in this respect applies with equal force to section one of the Act of 1903, and this interpretation of the Act of 1899 is emphasized by the form of affidavit prescribed by section eight of the act. The affidavit there is required to be made by an officer on behalf of the corporation, speaking throughout for the corporation as a legal entity, without reference to the constituency of its shareholders or the persons who promoted its corporate existence.

The first clause of section one prohibits combinations between two or more persons, natural or artificial, "to create or which may tend to create or carry out restrictions in trade or commerce, etc., or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state."

We pause here to note the use of the words "tend to create" in this paragraph. No one may know in advance what upon judicial inquiry may be held as tending to create restrictions in trade or commerce until the court has charged upon all of the testimony and the jury returned its verdict. Facts and acts that to one mind may be so remote in their influence upon each other as not to tend in the slightest degree to influence a certain result may be cogent and persuasive as proximate factors in bringing about that result in the mind of another. Different judges upon the same state of facts, different juries weighing the same facts, may reach diametrically opposite conclusions as to the tendency of these facts and acts

or in the eyes of different judges and different jurors the same individual may upon precisely the same state of facts be innocent of wrongdoing or a criminal; may be acquitted of forfeiture of property or bankrupt in fortune.

The second clause makes a trust a "combination of capital, skill or acts by two or more persons, firms or corporations, to fix, maintain, increase or reduce the price of merchandise," etc. This is all pervading. However innocent may be the combination of capital or skill, however beneficial may be to the public in the promotion of trade or commerce the union of capital or skill between two persons, however limited, may be the radius of influence of such a unification, the act is penalized by this clause.

It may be said of this clause, however, that its apparently unlimited scope will be reasonably limited by judicial construction, that that is certain which can be made certain by judicial determination, and that this act is no more general in its terms than the Sherman Anti-Trust law, which has been enforced by the courts. We do concede that an act so sweepingly general in its provisions may be made the predicate of a judicial proceeding, as in cases of injunction, by which the lines of conduct are clearly marked and defined in the decree, which could not be made efficient for the purpose of imposing a penalty or a criminal sentenee for an act done.

The remaining paragraphs of this section, except the seventh, are a reiteration in form of the general principles stated in section one of the Act of 1899. The seventh paragraph prohibits a combination to abstain from engaging or continuing in business or from purchases or sale of merchadise, etc., partially or entirely **within the State of Texas** or any portion thereof. This would seem clearly to limit the effect of this legislation to agreements between parties who are doing business at the time of the agreement within the territorial jurisdiction of the State of Texas.

Section two is only applicable in terms to combinations

or consolidations of corporations. When the affairs of two or more corporations are brought under the same management for the purpose of producing or which "tends to create a trust," as defined in the first section of the act it is called a monopoly. This is definitive of the thing produced by the combination and is not condemnatory of the factors whose combination produces the thing defined as a monopoly. It is also indefinite by reason of the use of the indefinite words "tends to create." It is also indefinite because of its reference to section one of the act which we have heretofore seen is indefinite and whatever of infirmity exists in section one by reason of its indefiniteness is imported into this paragraph of section two by reason of the reference.

The second paragraph pronounces any corporation which acquires the shares of stock or bonds or physical properties or a part of physical property of any other corporation for the purpose of preventing or lessening or where the effect of such acquisition tends to effect or lessen competition, whether the acquisition is accomplished by means of trustees or otherwise, a monopoly. This prohibition is leveled against the corporation which acquires the shares, not the corporation whose shares, bonds or property are acquired. It is indefinite also by reason of the use of the words "tend to effect or lessen." There is necessarily implied from these paragraphs that the combinations are prohibited only to those corporations that are engaged in a competitive business in the State of Texas; for if the corporations are not engaged in business in the State of Texas or if the business in which they are engaged is not competitive the prohibition cannot apply.

The two paragraphs of section three prohibit firms and corporations from entering into an agreement to refuse to buy or sell to another person, firm or corporation merchandise or produce or from boycotting or threatening to refuse to buy or sell to other persons, firms or corporations.

With respect to the provisions of the two acts which we have just considered, it is well to observe and bear in mind that in many places they specifically limit their scope to the transaction of business in Texas; for if not so limited by express terms, the scope of the acts is necessarily limited to the territorial jurisdiction of the State of Texas. Its sovereign powers are not efficient to control or regulate affairs which take place beyond its dominion and in other jurisdictions where the acts condemned by it may be authorized and allowed.

Having acquainted ourselves with the material provisions of the law under which the prosecution was instituted, it is well now to consider the interpretation of the law as made by the trial court in its charge to the jury and to determine whether the construction given by the charge is a correct interpretation of these acts. If the charge is a correct interpretation of the acts, we purpose to contend that its effect is to deprive this defendant of its property without due process of law. If it is not a correct interpretation of these acts, then we shall contend that the charge, being without authority of legislative law, being judicial legislation, deprives this defendant of its property without due process of law. Upon this broad text, we shall plant the several constitutional objections which we conceive to reach the vital parts of the case.

The essence of the charge comprising the only issues which were submitted to the jury for its determination is embraced in Paragraphs VII., VIII., IX., X., and XI.

Paragraph VII. authorizes the jury to return a verdict against the defendant if it should find that the defendant or its authorized agents became a party to an agreement or understanding with the Standard Oil Company of New Jersey on June 1st, 1900, "to fix or regulate the price in Texas of oil refined from petroleum and" * * * persisted in carrying out the same in Texas.

This charge is predicated on the first section of the Act of 1899, and my associates in their brief have argued that it refers to the agreement for the division of territory which was made by the old Waters-Pierce Oil Company with the Standard Oil Company of Ohio in 1878. This was the view of the instruction apparently taken by the Court of Civil Appeals, as appears from the seventh section of the opinion, where the court speak of an agreement "one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the State of Texas." The decision of the court sustained the claim then made by the State, but as appears from the motion to dismiss or to affirm, filed in this court on the 12th of October, 1908, the State now abandons that position, and as appears from page 43 of that motion, now submit "that not a shadow of a cause of action or offense is submitted in either of these charges of the court growing out of any such division of territory." So that between the highest court of Texas and this court, the State seeks to change its position as to the construction of the court's charge.

If the charge does not refer to the agreement in question, it can only refer to the agreement implied from the conceded fact of the ownership by the Standard Oil Company of New Jersey of about sixty per cent of the shares of the stock of the Waters-Pierce Oil Company.

There was testimony tending to show and in nowise disputed that the Company bought nearly all of its supplies from the Standard Oil Company of New Jersey, and paid the price charged it for said supplies by the Standard Oil Company. It would seem absurd to contend that this instruction to the jury meant to imply that it was unlawful for the vendor of a commodity to fix the price at which it should be sold to the vendee, or that any agreement to fix the price can be inferred from the fact that the vendee paid the price which was charged by the vendor. The uncontradicted testimony is that the officers of the Waters-Pierce Oil Company at St. Louis fixed the price at which all of its commodities were sold throughout the territory in which it operated, and that neither the Standard Oil Company of New Jersey nor any other person had any part or voice in fixing the sale price of its commodities to the consumers in its territory.

In addition to the argument as made by my associates upon the construction of paragraph 7 of the charge, I would add that before the jury could reach any conclusion in regard to the agreement for the division of territory they should have been asked to find whether the Waters-Pierce Oil Company by any definite act or expression upon its part had made, approved or adopted the division of territory. An agreement to fix prices is quite different from an agreement as to the division of territory. If, however, the agree-

ment or understanding between the defendant and the Standard Oil Company of New Jersey to fix and regulate the prices of petroleum in Texas to which the court referred is any understanding or inference arising from or drawn from the fact of the ownership by the Standard Oil Company of New Jersey of a majority of the shares of stock in the Waters-Pierce Oil Co., I should say that no such inference is legitimately deducible from that fact.

In State v. Shippers' Compress & Warehouse Co., 69 S. W. Rep. 58 (1902), the Supreme Court of Texas, concerning a similar proposition, said:

> "The defendant-in-error claims that there is no evidence tending to prove that the incorporators secured the charter and organized this corporation to create and carry out restrictions in aids to commerce, and that the judgment should be affirmed, notwithstanding the state might have the right to forfeit the charter if the proof established a violation of the Anti-Trust Law. We are of the opinion that this contention is sound and that there is no evidence which tends to support the charge upon which the forfeiture of the defendant's charter is sought. * * * The charter expresses the purpose of the corporation in the very language of the statute, therefore it cannot be said that the purposes for which it was organized, as expressed in the charter, furnished any evidence of an intention to violate the law. The corporation could lawfully

do everything expressed in the charter and might lawfully buy all the compresses that it purchased. The right to forfeit the charter depends upon the intent with which it was procured and it devolved upon the state to establish an unlawful intent to justify the forfeiture claimed."

What is here said of the organization of a corporation under the laws of Texas must be equally true of the Waters-Pierce Oil Company organized under the laws of the State of Missouri, that no illegality and no illegal purposes can be drawn from its charter by the State of Texas.

This charge is unsound whether it refers to the agreement of 1878 concerning the division of territory, a view dealt with by my associates, or an agreement to be inferred from the ownership of stock of the Waters-Pierce Oil Company by the Standard Oil Company.

The eighth paragraph of the charge authorizes a verdict against the defendant if the defendant brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey whereby the price in Texas of oils refined from petroleum was sought to be fixed or regulated or whereby the trade in such oil in Texas was sought to be controlled or limited." This charge is under the second section of the Act of 1899. It challenges and denounces the majority ownership of

stock of the Waters-Pierce Oil Company in the Standard Oil Company as an infraction of this section. The ninth paragraph of the charge directs the jury to find a verdict against the defendant if the defendant entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating or "which tended to create or carry out in Texas restrictions in the free pursuit" of the business of selling oil or to fix or maintain or increase the price of oil or to prevent or lessen competition in the sale of oil or if the defendant "was a party to and acted under such combination." This charge is under the Act of 1903. It challenges as a breach of the Act of 1903 the single act of stock ownership by the Standard Oil Company of New Jersey.

The tenth paragraph directs a verdict against the defendant if "the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control * * * and that they were placed under such common management or control * * * by their respectively authorized officers under such circumstances that such common management or control * * * created or tended to create or carry out restrictions in the sale in Texas of oil * * * or to fix, maintain or increase the price in Texas of such oil or to prevent or lessen in Texas the competition in the sale of such oil." This direction of the court is intended to present concerning the same fact as the previous one the application of another section of the Act of 1903.

The eleventh charge to the jury authorizes a verdict against the defendant if the Standard Oil Company of New Jersey had "acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations * * * and that the stock was acquired and combination effected * * * with the purpose or intention on the part of the managing officers

and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned or that the effect of said combination * * * tended to affect or lessen the competition in the sale in Texas of said oil."

This charge directly presents as a controlling and dominating factor the acquisition of the majority stock of the defendant company by the Standard Oil Company of New Jersey and the intention of the Standard Oil Company of New Jersey in making this acquisition.

It ignores entirely the minority holding of the stock and the fact of actual control of the affairs of the Waters-Pierce Oil Company. It also affords an intimation, though not a clear definition, of the words "combination, agreement or understanding," used by the court in the different preceding paragraphs of the charge.

We are thus brought face to face with the question whether the two acts above referred to independently of any construction or interpretation of them are valid; whether the interpretation given to them under the conceded facts of this case is the correct one and, if correct, whether this defendant may not claim the punishment imposed by the trial court as without due process of law.

DUE PROCESS OF LAW.

The principle of the essential charges to the jury is: **that the ownership of the majority shares of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey makes the former company a pool, trust or monopoly under the laws of Texas and its corporate organization a combination, confederation, conspiracy, agreement and understanding to fix, maintain and regulate the prices of oil in Texas, contrary to the Acts of 1899 and 1903.**

It is conceded by the bill that the defendant corporation was regularly organized on May 29, 1900, as a corporation

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under the laws of the State of Missouri. It is so averred in the bill and the defendant is so brought into court by process. Its character and status as a corporation is therefore unalterably fixed so far as this proceeding is concerned. (Distilling Co. v. People, 156 Ill. 448; Draining Co. v. State, 43 Ind. 236; People v. Sanford, 19 Pac. Rep. 693; Haskell v. Worthington, 94 Mo. 560; Catholic Church v. Tobbein, 82 Mo. 418; School District v. Hodgin, 180 Mo. 70.)

In Relfe v. Rundle (103 U. S. 222), this court said:

> "No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with, perhaps, the exception of commercial corporations; but if it does, without limitation expressed or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence."

In the case of United States Vinegar Company v. Schlegel (38 N. E. Rep. 729), the Court of Appeals of New York said:

> "It is suggested as a phase of the defense that the promoters deceived the authorities of the State of Illinois as to their real purpose in forming the corporation and in that way procured them to file the necessary papers and take the necessary steps to give the plaintiff a corporate existence. The suggestion has little if any support in the evidence, but if the fact had been established it would constitute no defense to this action. That state must be left to vindicate its own honor and dignity. If it be true that its authority has been invoked and its laws abased for the purpose of creating and fostering a corporation that is detrimental to public interests, it has ample power at any time to proceed against it and decree its dissolution, but so long as the plaintiff exists and is recognized by the courts and authorities of that state it is entitled to the same recognition here unless it appears that it was formed for purposes illegal here or was doing acts prohibited by the laws of this state to its own citizens and corporations."

It is conceded that the Waters-Pierce Oil Company, organized on May 29, 1900, under the laws of the State of Missouri, applied for and obtained a permit from the proper authorities of the State of Texas to do business there. The law under which this permit was obtained is found in chapter 17, article 745, vol. 1, Sayles, Texas Civil Statutes, and merely requires a foreign corporation to file "with the Secretary of State a duly certified copy of its articles of incorporation and thereupon the Secretary of State shall issue to such corporation a permit to transact business in this state." The permit under this law was issued for a period of ten years. There is nothing in this law which authorizes or justifies the Secretary of State to whom the application is made to inquire into the personnel of the shareholders of any corporation which may seek the license to do business in Texas and we have seen from our analysis of the Anti-Trust Acts of 1899 and 1903 that there is nothing in them to justify any such inquiry. So far, therefore, as the laws of Texas are concerned no authority is given to institute an inquiry into the personnel of the shareholders of any corporation which may seek under its laws to do business there. The integrity of the corporate organization of the defendant company must be unassailable in this proceeding. Its corporate entity cannot be dismembered for purposes of condemnation and preserved for punishment. But it is said the old company was banished from Texas because of its misdeeds and its dissolution under the Missouri law was not efficient, and the new company was the old one in another garb. This was alleged, but there was no effort to prove the averment. Whether the old company was dissolved or not is entirely immaterial because, whether dead or alive, either status does not disprove the conceded regularity of the organization of the new company and its corporate being. That the new acquired all of the property of the old one is not inconsistent with either the life or death of the old one. Whether

the old company properly and regularly conveyed its assets and for adequate consideration to the **new** is a matter that only concerns the creditors and shareholders of the former. When the regularity of the organization of the **new** company is legally established, its corporate being is freed from all the sins of the old one. Neither the acquisition of the name of the old company nor its property nor the status of its shareholders could legally burden it with the transgressions of the old one. To hold the contrary, would convert the entire law of corporate entity into chaos.

Penn Match Co. v. B. S. Hatgood, 141 Mass. 145;
Carmody v. Power, 26 N. W. 801;
R. R. Co. v. Sage, 65 Ill. 328;
Long v. Bank, 8 Utah, 104;
Capital, etc., Co. v. Offutt, 17 App. D. C. 292;
Clark & Marshall, Private Corporations, Sec. 335.

"We know of no rule or principle of the common law which authorizes suit to be maintained against one person who is *sui juris* for the default of another person who is equally *sui juris* whether the persons be natural persons or corporations, for one corporation can no more be held for the default of another corporation than can one natural person for the default of another natural person." (Capital Traction Co. v. Offutt, *supra.*

"The succeeding corporation is not liable for the debts or on the general contracts of the old corporation or for its torts; nor is the property in its hands liable therefor (a) unless there is an express agreement to pay or assume the same; (b) or unless there are circumstances from which such an agreement may be implied; (c) or unless the circumstances are such as to render the transfer a fraud upon the creditors of the old corporation; (d) or unless the corporation is a mere continuance of the old corporation; (e) or unless liability is imposed by statute; (f) or unless the liability arises out of an obligation or covenant running with the property acquired." (Clark & Marshall, Private Corporations, *supra.*)

"The declaration alleges contracts made before the plaintiff had a legal existence and does not show any contract to which the plaintiff was a party." (Penn. Match Company v. Hatgood, *supra.*

"An agreement with individuals that when they become incorporated they will give plaintiff a certain amount of paid up stock cannot on any rule of law be considered as dealing with the corporation itself or as one which would bind the future corporation when organized. It is possible there may be cases where an existing corporation becomes incorporated bodily, but we have no statute which allows manufacturing companies to become incorporated except by the action of separate individuals acting in their individual capacity and acknowledging their articles. Any bargain made here which looks to a future incorporation must necessarily be a personal one." (Carmody v. Power, *supra.*)

But suppose we resolve the defendant company into its constituent shareholders, the condition which the State of Texas in this proceeding strenuously insists upon establishing. The old Waters-Pierce Oil Company had been driven out of Texas and was no longer permitted to do business there. We assume for the sake of this argument that the Standard Oil Company of New Jersey and Mr. H. C. Pierce were the promoters of the present Waters-Pierce Oil Company, the defendant in this case. It is conceded by stipulation that the Standard Oil Company of New Jersey had never aplied for or obtained a license to do business in Texas and had never done any business there. It is conceded that Mr. Pierce had never personally engaged in the oil business in the State of Texas or elsewhere and was not so engaged at the time of the organization of the defendant company. In the nature of this physical situation there could be no combination between Mr. Pierce and the Standard Oil Company to suppress competition between them in the State of Texas for neither of them at the date of the organization of the present defendant company had any business in Texas and there is no evidence that they in-

tended to have except through the instrumentality of the defendant. It cannot be that if two individuals never engaged in competing business anywhere should form a partnership to engage in business in Texas that it would be an infraction of the Anti-Trust Laws of that state.

The further position advanced by the State of Texas is, assuming that the Standard Oil Company is a combination in restraint of trade generally, that its ownership of two-thirds of the shares of stock of the Waters-Pierce Oil Company taints the latter company in its entirety with the same illegality. The Waters-Pierce Company gets neither credit nor consideration for the confessedly innocuous one-third holding of Mr. Pierce who concededly owns no other oil interests, or for its actual control by the Pierce interest as apart from the potential control of the majority. Circumstances might arise in the affairs of a corporation when the minority shareholder would be bound by the conduct imposed upon it through the influence of the majority share owners, or even the corporation itself so bound if the majority owners were pushing the management of the corporation beyond the powers conferred by its charter, compelling it to do some illegal act and the majority shareholder stood by without protesting against such conduct when it became his duty to speak in protection of his interest and the interest of the corporation—then he might suffer as a participant in the wrongful act of the majority. But so long as the corporation was pursuing its legitimate purposes within the bounds of its power, violating no law, incurring no guilt, legitimately and honestly conducting its own affairs, there would be neither duty nor opportunity for a minority shareholder to protest or act. Whatever may be the sins, whatever may be the evil purposes of the majority shareholder, if they find no expression in the act or conduct of the corporation as a corporation, the corporation cannot be tainted by such evil.

Cases may arise and have arisen in which the practically

unanimous action of the shareholders of a corporation, though not in regular convention, has been held to be the act of the corporation because equivalent to the power residing in the shareholders in a duly called shareholders' meeting. This was the situation in the case of the State v. Standard Oil Company, 49 Ohio State and People v. North River Sugar Refining Company, 121 New York, 582. But there is no suggestion in this case which parallels the facts in either of these two cases. The contrary is overwhelmingly true. The minority shareholder's influence has dominated and controlled the affairs of the Waters-Pierce Oil Company and kept its business relations free from any illegal entanglement with those of the Standard Oil Company or any other company. The Standard Oil Company of New Jersey is not a party to this suit. It has commissioned no one to appear for it. Whether it is a malefactor is purely a gratuitous issue. It ought not to be stigmatized as such until by due course of law it has enjoyed an opportunity to defend itself against such a charge. Until it is convicted of a conspiracy in restraint of trade in a case where it has an opportunity to be heard and until Mr. Pierce is so convicted, there is no warrant for imputing their misdeeds to the Waters-Pierce Oil Company of which they are shareholders.

If the Waters-Pierce Oil Company is to be punished, it must be punished for its own corporate misdeeds. It cannot legally be made to suffer for the misconduct of others which it has no right to control.

In Durkin v. Kingston Coal Company, 171 Penn. 193, an effort was made under a law of Pennsylvania to hold the coal company responsible for the negligence of an overseer, involuntarily placed in charge of its property. The Court said:

> "The first article of the constitution of this state known as 'Bill of Rights,' declares that all men are possessed of certain inherent and inalienable rights.

One of these is the right to acquire, possess and protect property. The preservation of this right requires both that every man should be answerable for his own acts and engagements and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. * * * Incredible as it may seem, obedience on the part of the mine owner does not protect him; but if the mine foreman fails to do properly what the statute directs him to do the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another."

The same court, in the case of Commonwealth v. Water Company, 119 Penn. 569, which was a proceeding in *quo warranto* against the defendant upon a supposition that it had fraudulently and unlawfully entered in a combination with the Lindsey Water Company to convey and vest in the latter the control and management of its franchises, property and waterworks and that in carrying out such combination it had lost its identity and virtually become extinct, said:

"The Lindsey Water Company, by acquiring a majority of the capital stock of the Punxsutawney Water Company, did not acquire the property and franchises of the latter. The transfer of a majority of the stock was not a transfer of the property of the company. The transfer was of the rights of the stockholders and the existence of the corporation was in no manner affected by it. It is being continued, subject to the supervision of the Commonwealth, with the right to go on in the exercise of its privileges and the performanc of its duties until by some act of its own, either of omission or commission, the penalty will be forfeiture. **No misconduct of the Lindsey Water Company, and nothing that one or more of a majority of the stockholders of the appellee may have done in disposing of their stock can be**

charged to it. If it is to perish it must be for its own sins and not for those of another. We have no concern on this appeal with what the Lindsey Water Company is alleged to have done."

No extended argument or illustration would make this principle more lucid than it has been made in the statement of the two preceding cases. Its statement at once appeals to the conscience and the intelligence of mankind. We have endeavored to show that neither the acquisition of its name nor the stock of the **old** Waters-Pierce Oil Company nor the previous condition of the shareholders of the old company nor the business relations of the shareholders instituted or promoted the corporate existence of the defendant; nor their personal acts, not manifested in the corporate acts of the defendant, could legally or justly be imposed upon the defendant to condemn it under the Anti-Trust Law of Texas; and that what really occurred in this case was an indictment of the Standard Oil Company of New Jersey, which was not brought into court for trial, and a conviction and punishment of the Waters-Pierce Oil Company upon that indictment. This, we contend, cannot be due process of law. It would be conviction without offense and death without sin, a result revolting to conscience and fair dealing.

TO IMPOSE A PENALTY UNDER A LAW WHICH DOES NOT SPECIFY THE ACTS WHICH CONSTITUTE THE OFFENSE IS THE ENFORCEMENT OF AN *EX POST FACTO* LAW.

A law enacted to define and punish past acts as an offense is not different from one whose terms are so indefinite as not to enable one to know whether his act is criminal until its character is defined by the interests, opinions and prejudices of those called upon to sit in judgment on it, influenced it may be by the time, place and circumstances of the trial. The prohibition of an act only as it may appear unreasonable to the minds

of those charged with the final determination of the matter is essentially an *ex post facto* edict.

> "The laws which create crimes ought to be so explicit in themselves or by reference to some other standard that all men subject to their penalties may know what it is their duty to avoid." (U. S. v. Sharp, Peters 118.)

A law of Arkansas made it a misdemeanor to commit any act injurious to the public health or morals, etc. A complaint charged Andrew Jackson with offending this law by leaving his wife. The accused petitioned the Supreme Court of Arkansas for release under a writ of *habeas corpus*. In granting it, the court said, referring to the statute:

> "For want of something more definite the Justice of the Peace has brought it now to bear upon Andrew Jackson and it must be noticed. We cannot conceive how a crime can on any sound principle be defined in so vague a fashion. Criminality depends under it upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying and the courts would be constantly appealed to as instruments of moral reform changing with all fluctuations of moral sentiment. The law is simply null. The constitution which forbids of *ex post facto* laws could not tolerate a law which could make an act a crime or not according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed." (*Ex parte* Andrew Jackson, 45 Ark. 158.)

The Court of Appeals of Kentucky, in discussing a statute which fixed a penalty for charging more than a just and reasonable rate of toll, said:

> "If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law, and in violation of both state and federal constitutions, we are not able to comprehend the force of our organic laws. In Louisville & N. R. Co. v. Railroad Commission of Tennessee, 16 Am. & Eng. R. Cas. 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): 'Penalties cannot be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can

be thus confiscated, the crime for which the penalty is inflicted must be defined by the lawmaking power. The legislature cannot delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a "fair and just return" on its investments, it must, in order to the validity of the law, define with reasonable certainty what would constitute such 'fair and just return.' The act under review does not do this but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence cannot know, in advance of a verdict, whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at the rate of 6 per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms.' The Supreme Court of the United States, in Railroad Commission Cases, 116 U. S. 336, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, refers to this Tennessee case, and substantially approves it by distinguishing the case then before the court from the Tennessee case. This case is also used to support the text in 8 Am. & Enc. Law p. 935, where it is said: 'Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury.' Mr. Justice Brewer, in the case of Railways Co. v. Dey, 35 Fed. 866, had under consideration the provisions of a statute similar to the one we have before us, and, while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge there said: 'Now the contention of complainant is, that the substance of these provisions is, that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complain-

ant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down 'That it is impossible to dissent from the doctrine of Lord Coke that acts of parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in legal matters.' (Citing cases.) And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of 'improper conduct,' and a statute, which makes it a criminal offense to charge more than a reasonable rate.' The same learned judge, discussing the kindred subject of unreasonable differences in rates, in Tozier v. U. S., 52 Fed. 917, said: 'But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." (L. & N. R. Co. v. Commonwealth, 35 S. W. 129).

Great volumes of judicial opinions, expressing great contrariety of views, admonish us that trained minds are quite prone to have different judgments often upon the same state of facts as to what will and what will not constitute agreements in restraint of trade at common law. How much more subject to variation must be untrained minds, called upon to solve the same question. And especially is this true when they are called upon to determine the proximate cause in a chain of events, complicated by many factors and extending over a period of twenty-five or thirty years.

By the eighth paragraph of the charge in this cause, the jury was told to convict the defendant if "it brought about or permitted any combination, etc. whereby the price in Texas, of such oil would be reasonably calculated to be fixed or regulated or whereby the trade in such oil* * * * * * * * was sought to be controlled or limited." The jury was not given any definition of "combination" nor what was meant by "permitted." It was left to erect its own standard of legal definition of "combination." How the defendant may responsibly

permit a combination was not told them. Whether it would be guilty by mere negative action when it was under neither a legal nor moral duty to protest was not told them. The real vice of the charge consists in the use of the words "reasonably calculated" and these are substantially the words employed in the statute. "Reasonably" means with good sense or judgment." "Calculated" means "computed by weighing related facts or circumstances in the mind." The good sense or judgment brought to bear upon the solution of any state of facts in approval or disapproval depends to the largest extent upon the particular tendencies and mental skill of each individual. What might appear reasonable to one mind might appear unreasonable to another and whether an act was calculated to produce a given result would depend upon the breadth of comprehension and logical training of the mind appealed to for determination of the matter. One mind might reasonably look only at the facts immediately connected with the transaction. Another might penetrate far into the past and consider as potential many things in no wise related as cause and effect. Thus you would have, perhaps upon the same state of facts, a pronouncement of innocence and guilt. A conclusion logically argued, from well sustained facts, might subject a person to conviction at the hands of minds less intelligent a nd astute called upon to administer the law.

This language lacks the element of precision and definiteness necessary to create a criminal offense or impose a penalty. It leaves the judge and the jury to legislate, and they are as much bound by the constitutional prohibition against *ex post facto* legislation as is the legislature.

It is said, however, that the Sherman Act is not less definite than this in some of its provisions. We are not advised of any sustained convictions under the criminal provisions of the Sherman Anti-Trust Act. It may be made the basis of injunctive relief although obscure and ambiguous in definition; or by the decree, a rule of conduct prohibited is clearly marked out and defined.

In the case of Swift & Co. v. U. S., 196 U. S. 401 *l. c.*, this

court struck from the decree the words "or by any other method or device the purpose and effect of which is to restrain commerce as aforesaid," because of its indefiniteness, saying:

> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do."

If terms so indefinite must fail in a prohibitive decree because of their indefiniteness and lack of advice as to what is forbidden to be done, they must certainly fall in a statute which imposes criminal penalties.

H. S. PRIEST,

Of Counsel for Plaintiff-in-Error.

FILED
OCT 13 1908
JAMES H. McKENNEY
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1908

No. 360

WATERS-PIERCE OIL COMPANY, PLAINTIFF-IN-ERROR

AND

STATE OF TEXAS, DEFENDANT-IN-ERROR

MOTION

OF THE PLAINTIFF IN ERROR TO CONSOLIDATE THIS CAUSE WITH No. 359

AND BRIEF

MOORFIELD STOREY
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Counsel for the Plaintiff in Error

(21,131)

In the Supreme Court of the United States

OCTOBER TERM 1908

No. 360

WATERS-PIERCE OIL COMPANY . . . PLAINTIFF-IN-ERROR

AND

STATE OF TEXAS . . . . . DEFENDANT-IN-ERROR

MOTION

It is moved on behalf of the Plaintiff-in-Error the Waters-Pierce Oil Company that this cause may be consolidated with the cause No. 359 of this term now pending in this Court between the same parties and entitled *Waters-Pierce Oil Company* plaintiff-in-error v. *State of Texas* defendant-in-error and that the record in the last-mentioned cause may be treated as part of the record in this cause and that the said two causes may proceed henceforth in this Court as one consolidated cause.

Both of the said causes arise upon appeals in one and the same action in the District Court of Travis county in Texas, No. 24,551, which was brought by the State of Texas against the said Waters-Pierce Oil Company to recover penalties for supposed violations of the "Anti-Trust Laws" of Texas (*Record*, No. 359, p. 2), and in that court there was only one record upon which all the questions involved in both of them appear.

Judgment in the action was given in that court on the 1st June 1907 upon a verdict against the Waters-Pierce Oil Company for penalties in the sum of $1,623,900 (*Rec.* No. 359, p. 314), and the Waters-Pierce Oil Company appealed from that judgment to the Court of Civil Appeals and gave a bond with sureties in the sum of $3,275,000 to supersede proceedings upon the judgment pending the appeal (*Rec.* No. 359, p. 319–322).

In the same action immediately after this judgment and on the same day, but after a motion for a new trial had been filed by the defendant (*Rec.* No. 359, p. 315), an application was made by the State for the appointment of a receiver of the property of the Waters-Pierce Oil Company (*Rec.* No. 359, p. 323; *Rec.* No. 360, p. 1), alleging among other things that the State would have no means of collecting the judgment if the property of the Company were removed from Texas, and that the State had a lien upon the property to secure payment of the judgment by virtue of an act of April 11th, 1907, then recently passed (printed in *Rec.* No. 360, p. 42–43). Upon this application the District Court made an order appointing a receiver (*Rec.* No. 359, p. 327–329; *Rec.* No. 360, p. 5–8), and in doing so proceeded entirely upon the ground that the judgment had been rendered in the action, of which the Court took judicial notice, as appears by the bill of exceptions signed by the judge (*Rec.* No. 359, p. 341, 349; *Rec.* No. 360, p. 19–20, 27). The Waters-Pierce Oil Company also appealed from this order to the Court of Civil Appeals and gave a further bond with sureties in the sum of $100,000 to supersede proceedings under the order (*Rec.* No. 359, p. 327–329, 349; *Rec.* No. 360, p. 6–8, 28).

The two appeals were filed simultaneously in the Court of Civil Appeals on the 10th September 1907 and were treated in that court as two cases, the appeal from the judg-

ment on the verdict being No. 4212 (*Rec.* No. 359, p. 395, 1141) and the appeal from the order appointing the receiver being No. 4213 (*Rec.* No. 360, p. 36).

After the judgment and order of the District Court had been affirmed by the Court of Civil Appeals upon both appeals, and applications for writs of error had been refused by the Supreme Court in both cases (*Rec.* No. 359, p. 1187; *Rec.* No. 360, p. 82), the writ of error in No. 359 in this Court was brought upon the judgment of the Court of Civil Appeals in No. 4212 (*Rec.* No. 359, p. 1213), and the writ of error in No. 360 was brought upon the judgment in No. 4213 (*Rec.* No. 360, p. 108).

The record in the former of the two appeals (No. 4212) comprised all the proceedings in the action No. 24,551 in the District Court, including the proceedings relating to the appointment of the receiver, as appears by the certificate of the clerk (*Rec.* No. 359, p. 395). The record in the latter appeal (No. 4213) contains only the part of the proceedings in the action that relates especially to the appointment of the receiver, as appears by the clerk's certificate (*Rec.* No. 360, p. 36). This part of the proceedings in the District Court is printed on pages 1–30 of the record in No. 360 in this Court, which are identical with pages 323–352 of that in No. 359.

The Court of Civil Appeals advanced the appeal from the order appointing the receiver (No. 4213) for hearing before the appeal from the judgment on which it was founded (No. 4212), and refused a motion to consolidate it with the latter appeal (*Rec.* No. 360, p. 55), and on the 23rd October 1907 affirmed the order appointing the receiver (*id.* p. 56). A motion was made for a rehearing (*id.* p. 59), and was overruled on the 11th December 1907

(*id.* p. 64), and on the same day a mandate was issued from that court to the District Court (*id.* p. 73).

This mandate could only have been so issued on the assumption that the order appointing the receiver was an interlocutory order, for, if the order was final in its nature, the Supreme Court had jurisdiction to review it upon a writ of error and the mandate could not properly be issued until the expiration of the time allowed for an application to that court for a writ of error.

Accordingly the Waters-Pierce Oil Company applied to the Supreme Court by motion to direct that the mandate be recalled, and the motion was granted (*Rec.* No. 360, p. 73) for the reasons set out in the opinion of that court printed in the same record (p. 75–76). In stating these reasons the court said (p. 75)

> "The order appointing the receiver, although made subsequently to the date of the judgment, but at the same term, might have been reviewed in the appeal of the principal case. The parties have treated this as a separate proceeding presenting separate records to the Court of Civil Appeals, and that court has passed upon it as a separate and distinct case from the main suit, *but the separation of the two cannot deprive appellant of the benefit of a review of the order;* this court has jurisdiction of the case as presented.
>
> "It is also objected by the state's counsel that this court has no jurisdiction of this branch of the proceeding, because the order appointing the receiver is an interlocutory order, and this court has jurisdiction only of final judgments of the Court of Civil Appeals. If this be an interlocutory order, then the objection is well taken, for this court has no jurisdiction to review such an order of the District Court and of the Court of Civil Appeals. . . . . The order clearly comes within the definition of a final decree or order, for, so far as the defendant was concerned, it finally disposed of the matter then before the court, which was, the appointment of a receiver to take the property into his

custody *as a consequence* of the complete determination of the controversy. If the contention were sustained, the defendant would be deprived of the right to have that order reviewed by this court. . . . . ."

It is plain therefore that the judgment and order involved in the two appeals were parts of a single case. Both appeals might properly have been dealt with upon one record of the whole case in the Court of Civil Appeals, and the separation of them in that court did not deprive the defendant of any right to have the order reviewed as if they had not been separated.

As the Court of Civil Appeals had previously refused for some undisclosed reason to consolidate the appeals (*Rec.* No. 360, p. 55) and entered separate judgments, and there were two separate records in that court, it was necessary for the defendant to bring separate writs of error in this Court. But the record in one case (No. 359) contains all the proceedings in the District Court, as well those by which the judgment was obtained as those relating to the appointment of the receiver, while the record in the other (No. 360) contains only the proceedings immediately relating to the appointment of the receiver. If the judgment is reversed by this Court in the former case, the order appointing the receiver, which is dependent on that judgment, must fall with it and be reversed, as prayed at the end of the assignment of errors (*Rec.* No. 359, p. 1208). Otherwise the defendant would not "be restored to all things which it hath lost by reason of the said judgment" (as it is entitled to be in such a case, 2 Wms. Saund. 101 *gg*), and would be in the same position as if an order for the issue of an execution were left in force after the judgment of which it was a consequence had been reversed. But this disposition of No. 359 would not by itself dispose of the judgment of the Court of Civil Appeals in No. 360,

which separately affirmed the order appointing the receiver. In order that it may have this effect, the cases ought to be consolidated, so that the record containing all the proceedings may be joined to the record that contains only a part of them. The errors affecting the judgment upon which the appointment of the receiver depended would then appear in both cases, and the same disposition would be made of both.

It would be an absurdity, if this Court, after reversing the original judgment and the order appointing the receiver in No. 359, were obliged to say that the record in No. 360 did not disclose any of the errors for which the judgment was reversed and that the judgment of the Court of Civil Appeals affirming the same order must therefore be affirmed. Yet this difficulty may arise as a result of splitting one record into two, unless it is removed by consolidating the proceedings. For the whole of the record of the Court of Civil Appeals in the latter case has been brought here by the writ of error in No. 360, but it contains only a part of the record of the District Court.

The difficulty has arisen from the separation of the appeals in the Court of Civil Appeals, which is a thing that ought not to have been done, as appears by the decision of the Supreme Court. The defendant was obliged to appeal from the order appointing the receiver, as well as from the judgment upon which it was founded, and to file both appeals in the Court of Civil Appeals. Otherwise the order appointing the receiver, which was in the nature of an execution upon the judgment, might have been put in force and the defendant's property would have been seized by the receiver, although the judgment upon which the order was dependent had been suspended by the previous appeal. It was to prevent this, that the defendant ap-

pealed from the order appointing the receiver and gave the second supersedeas bond in the amount fixed by the judge, who ordered that thereupon further proceedings be suspended pending the appeal (*Rec.* No. 359, p. 329–330; *Rec.* No. 360, p. 8). When the two appeals were filed in the Court of Civil Appeals, they ought to have been treated as two successive appeals contained in one record. The manner in which they were entered and dealt with by the officers of the court was not in the control of the defendant. The defendant ought not to be prejudiced by such action (*Minot* v. *Mastin*, 95 Fed. R. at p. 739 (C. A.)). When the mistake had been made of separating the two appeals, the Court of Civil Appeals should have set the matter right by granting the motion of the defendant to consolidate the cases. Instead of doing so (*Rec.* No. 360, p. 55), that court took the extraordinary course of advancing the appeal from the order appointing the receiver (*ibid.*), and of affirming the order (*id.* p. 56) seven weeks before deciding that the judgment upon which the order was dependent was valid, and while proceedings on the judgment were suspended by the appeal (*Rec.* No. 359, p. 1162).

As the whole record of the District Court, as well as the record of the proceedings of the Court of Civil Appeals upon both appeals, is here in the two causes, this Court has power to consolidate them and to dispose of them as parts of one case, which they really are.

R. S. s. 921.

The North Star, 106 U. S. at p. 27.

Lant v. *Kinne*, 75 Fed. R. 636 (C. A.).

U. S. v. *Union Pacific Rld. Co.*, 98 U. S. at p. 604–605.

There are no rights of the State that can be prejudiced by consolidating the cases.

The application for the appointment of the receiver *alleged* other grounds for the appointment besides the recovery of the judgment (*Rec.* No. 359, p. 323; *Rec.* No. 360, p. 1). Those allegations were all denied (*Rec.* No. 359, p. 325; *Rec.* No. 360, p. 4) and the issue was never tried. When the application came on for hearing, the judge, without hearing any evidence, announced his conclusion that he should take judicial notice that *the judgment* had been rendered, and, although the defendant had appealed from the judgment and he assumed that the proper supersedeas bond would be given, yet, as it had come to his attention through the newspapers that the defendant by its counsel had declared its intention of carrying on its business pending the appeal in the same manner as before notwithstanding the judgment of conviction [which was questioned by the appeal and suspended while it was pending], he would appoint a receiver to take charge of its property and deprive it of the instrumentalities by which it violated the law (*Rec.* No. 359, p. 341; *Rec.* No. 360, p. 19–20), "and *without any evidence being submitted* to the court in connection with said application, the court thereupon announced that it would grant the said application and appoint a receiver as therein prayed for" (*Rec.* No. 359, p. 342; *Rec.* No. 360, p. 20), as more fully appears by the bill of exceptions signed by the judge.

The proceeding for the appointment of a receiver being supplemental to the judgment, the cases ought to be consolidated so that this Court may enter a decree finally disposing of all the matters involved in both appeals.

MOORFIELD STOREY
J. L. THORNDIKE
E. B. PERKINS

In the Supreme Court of the United S

OCTOBER TERM, 1926.

No. 3[illegible]

WATTERS-PIERCE OIL COMPANY [illegible]

vs.

STATE OF TEXAS, Defendant in Error.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR ON [illegible] CAUSE.

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States,

OCTOBER TERM, 1908.

No. 360.

WATERS-PIERCE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

STATE OF TEXAS, DEFENDANT IN ERROR.

ANSWER TO MOTION OF PLAINTIFF IN ERROR TO CONSOLIDATE CAUSES.

In answer to the motion of plaintiff in error to consolidate this cause with Cause No. 359, defendant in error, the State of Texas, says that said motion should be denied and in all things overruled for the following reasons, towit:

1. The said motion and brief in support thereof disclose no sufficient grounds for the consolidation of said two causes.

2. It appears from said motion, the records in said two causes, and the nature of the questions involved therein, that no saving of time, labor or expense will be accomplished in any appreciable degree by consolidating the same.

3. Said two causes, as brought to this court by writs of error and to the Court of Civil Appeals and Supreme Court of Texas by appeal and writ of error, respectively, constitute two separate and distinct suits on appeal, made so by the acts and policy pursued by plaintiff in error, and this court should not disturb that status upon motion of plaintiff in error alone.

4. For this court to consolidate the two causes would be to review and reverse the rulings of the two State courts, towit, the Court of Civil Appeals (which overruled a similar motion made by plaintiff in error, Rec. No. 360, p. 55), and the Supreme Court of Texas (which, by denying a writ of error, decided that the Court of Civil Appeals properly overruled the motion to consolidate, Rec. No. 360, p. 82); and such would be the result, although

no assignment of error complaining of such action by the State courts was made and none appears in the record.

5. The appeal in this cause involves alone the validity of the order of the trial court in appointing a receiver for the property of plaintiff in error; and by the decisions of this court the mere appointment of a receiver by a State court raises no Federal question; therefore, to grant this motion to consolidate, would be to burden this cause with a Federal question (if one is raised by the record in Cause No. 359), which result this court, in the exercise of a discretionary power, should not bring about.

6. To grant the motion to consolidate would be unreasonable and a great disadvantage to defendant in error in this: Under the Texas statutes, the appointment of a receiver by the trial court was not dependent upon the judgment in the main case alone, but could have been lawfully made in such a suit whenever the interests of the State seemed to require such action; but if said motion be granted and the main case (No. 359) should, for any reason, be reversed, then the order appointing a receiver might be reversed with it, although this court should be of the opinion that no reversible error was shown in the appointment of a receiver, from the record in this cause.

It must be conceded that this court, under Revised Statutes, Section 921, and perhaps by virtue of its inherent power, has the authority to consolidate the causes; but such course is not a matter of right to plaintiff in error. It is a discretionary power only, usually invoked to save time, labor or expense, where cases of like nature are pending in the same court. Here there will be little saving of either, as the records in both causes are filed and briefs practically ready, if not entirely so. If desired by the court, or requested by counsel and approved by the court, submission and argument of the two causes may be had at the same time, without any order of consolidation.

The status of these two causes in this court as separate and distinct appeals, with different records, is in nowise attributable to defendant in error, but arise solely from the action of attorneys for plaintiff in error. They can not successfully contend that they had no control over the matter of docketing the appeals as separate causes, because it was the plain duty of the clerk of the Court of Civil Appeals to enter them upon the docket as separate causes when separate and distinct records were filed with him.

When the appeals from the judgment in the main case and in the receivership case were perfected, instead of incorporating the proceedings in one record, which the Supreme Court of Texas held might properly have been done, and which would have made but one case on appeal, plaintiff prepared and filed in the appellate court two separate and distinct and different records. By this action the Waters-Pierce Oil Company caused two cases to be made on appeal, and now asks this court to relieve it from the legal consequences of its mistake, if such it be. The usual grounds for asking the court to consolidate causes are not the real reasons for this motion. The actual motive is disclosed in the argument contained in the first paragraph beginning on page 6 of the brief in support of the motion. The fear is that this court, passing upon the record in this cause (made by plaintiff in error), may affirm the order of the trial court appointing the receiver, but may also reverse the main judgment. In that event, the State receiver might take charge of the business of the plaintiff in error, pending the final determination of the litigation. It is earnestly insisted on behalf of the State that if such result might follow from a denial of the motion to consolidate, it is nothing more than the right to which the State is entitled. It would afford no just or reasonable ground for this court to deprive the State of an advantage which the course of the Waters-Pierce Oil Company, in taking two appeals, had given it. On the contrary, it furnishes every reason why the rights of the State should be preserved and protected, especially in view of the fact that the contingency can arise under separate consideration of the two appeals, wherein the receivership case might be decided prior to a decision on the merits of the main case, and, in view of the further fact that the property of the plaintiff in error, as shown by the record, consists of volatile oils subject to seepage, leakage and evaporation, and the further fact that it is necessary to keep the business of the plaintiff in error a going concern in order to preserve the value of its property, i[illegible]siness and its business connections, and in view of the further fact that the property is now in the hands of a Federal receiver, which case is pending before this court, and of which you will take judicial notice for the purpose of considering the question here raised. We make the point that in the event the case of Bradley W. Palmer against the Waters-Pierce Oil Company is affirmed by this court and the Federal receiver ordered dis-

charged in accordance with the judgment of the United States Circuit Court of Appeals, it would produce the situation wherein the property would be forced back into the hands of the Waters-Pierce Oil Company, which, according to the record, has shown that it can not operate it or preserve the value of the property by reason of the fact that it can not secure agents to handle its business on account of the provisions of the anti-trust laws of the State of Texas subjecting agents of trusts to punishment by confinement in the penitentiary.

Should the court consolidate this cause, as prayed for, with the main case, and in due course of its business affirm the case of Bradley W. Palmer vs. Waters-Pierce Oil Company, there would be no one to take charge of the property and prevent the losses which would result in case the plaintiff in error should be compelled to take possession of its property before the litigation in the main case for ouster and penalties was finally adjudicated.

It also appears from the record that the State is asserting a lien upon this property, and, moreover, it is shown by the record that the plaintiff in error's property situated in Texas is not sufficient to pay the judgment secured against it in this case. Therefore, the State of Texas has a material interest in preserving the value of the property, to prevent loss to the stock in trade consisting of perishable goods, by keeping the business a going concern and preventing a depreciation in the value of the business connections which plaintiff in error avers is valued at $2,000,000. Consequently, these two causes should not be consolidated for the reason that if no error appears in the record appointing said receiver, the State is entitled to an affirmance of that judgment so that someone authorized to take possession of the property could do so in the event the judgment in the case of Bradley W. Palmer against Waters-Pierce Oil Company is affirmed and the receiver therein appointed discharged.

This being a substantial right of the State, it appears that under such circumstances this court will not deprive the State of such right by consolidating these two causes with the possibility of producing the situation pointed out.

The section of the Revised Statutes regulating consolidations of causes in United States courts contains this limitation: "* * * and may consolidate said causes *when it appears reasonable to do so.*" Would it be reasonable to consolidate these causes

in view of the responsibility for the present status and taking into consideration the possible injury the State might suffer thereby, as suggested above? We think not.

Another phase presented by this motion, if granted by the court, is the practical effect of such action upon the rulings made by the Texas appellate courts upon a similar motion in these very causes. While it must be conceded that the granting of the motion by this court would not, in itself, formally reverse the judgments of either Texas court, yet it is equally true that such would be its effect. A motion was made in the Court of Civil Appeals by the Waters-Pierce Oil Company to consolidate the two appeals, which motion was overruled by that court (Record No. 360, p. 55). The Waters-Pierce Oil Company applied for a writ of error to the Supreme Court of Texas, which was refused by the latter court (Record No. 360, p. 82). Under the Texas practice the appellate courts had the power to consolidate these causes, but the Court of Civil Appeals expressly refused to do so, and the Supreme Court, by overruling the application for a writ of error, and by itself treating the two appeals as two separate causes when they reached that court, sustained the ruling of the Court of Civil Appeals. The authority of those courts over the question of consolidation of causes was a discretionary one, just as it is here, and was not required by any statutory direction.

It is earnestly insisted by plaintiff in error in the brief in support of this motion that the two appeals were essentially one case, but this contention was overruled by the Court of Civil Appeals in refusing to consolidate them. That position was taken by the plaintiff in error in the Supreme Court of Texas in its motion for the recall of the mandate issued by the clerk of the Court of Civil Appeals in the receivership case. Counsel for the State then contended that if the two appeals were in fact but one case, the application for a writ of error to the Supreme Court in the receivership matter and the said motion also were prematurely filed, because the main case was still pending in the Court of Civil Appeals, no motion for rehearing having been yet filed in that court. To this contention the Supreme Court of Texas replied:

"On hearing of the motion of the Waters-Pierce Oil Company to recall the mandate of the Court of Civil Appeals from the district court, it was objected by counsel for the State that if the Waters-Pierce Oil Company be correct in its contention, that this

was not an independent suit, but only an incident of the main controversy, a writ of error could not be separately prosecuted, therefore, the case was not properly before this court. It is sometimes the case that there may be more than one appeal in the same case when orders are made at different times which finally dispose of the subject matter of that particular order. A familiar instance is a case of partition wherein there may be a decree which determines the rights of the parties in the property and is a final judgment upon the merits of the case. From this an appeal may be taken leaving the case before the court for the purpose of actual division of the property among the claimants according to the decree entered. When the partition shall have been made and the decree of partition entered there is another final judgment or order from which an appeal may likewise be taken. (White vs. Mitchell, 60 Texas, 164; Moor vs. Moor, 63 S. W. Rep., 357.)

"The order appointing the receiver, although made subsequently to the date of the judgment, but at the same term, might have been reviewed in the appeal of the principal case. The parties have treated this as a separate proceeding presenting separate records to the Court of Civil Appeals and that court has passed upon it as a separate and distinct case from the main suit, but the separation of the two can not deprive appellant of the benefit of a review of the order; this court has jurisdiction of the case as it is presented." (Rec. No. 360, p. 75.)

The Supreme Court then decided that the order appointing a receiver was not an interlocutory but a final decree from which an appeal might reach the Supreme Court in due course. (Rec. No. 360, pp. 75 and 76.) Upon that ground the Supreme Court took jurisdiction of the motion and writ of error filed by the Waters-Pierce Oil Company. From this it is clear that the Supreme Court, while holding that the order appointing a receiver was, in a broad sense, part of the main case, decided that plaintiff in error had legally prosecuted a separate appeal from the order of the trial court, and was entitled to the benefit of the review of the same before the Supreme Court. The decision meant nothing more, and the Supreme Court treated the separate appeal as a separate case when it took jurisdiction of said motion, and when passing on the two applications for writs of error which were separately docketed in that court and separately overruled on the same day. (Rec. No. 360, p. 82; Rec. No. 359, p. 1187.) Thus

we have the judicial determination of the Supreme Court of Texas that while the Waters-Pierce Oil Company could not be denied the benefit of a review of the order appointing a receiver, the appeal therefrom should be continued as a separate case just as the Waters-Pierce Oil Company had brought it up on the record.

Again, not only did the Court of Civil Appeals overrule the motion of the oil company to consolidate the causes, but in deciding the receivership appeal used the following language:

"That branch of the case in which the receiver was appointed is merely an arm of the main case, and is incidental to that proceeding. Both of the statutes quoted and mentioned authorize and empower, if they do not expressly direct, the trial court to appoint a receiver when the State obtains its judgment cancelling the permit. And there is another provision of the Act of 1907 which authorizes a receiver to be appointed when the interests of the State might require it to be done. In view of these statutes, it is folly to say that the trial court must lose sight of the main controversy when he undertakes to appoint a receiver; that before that jurisdiction can be exercised he must again rehear and review the facts that were established in the original case upon which the receivership depends, and we are of the opinion that the court was correct in the conclusion that it could take judicial knowledge of the facts established in the main case and the judgment based thereon. The appellant has seen fit to perfect a separate appeal from the order appointing a receiver, and it has no statement of facts in the record showing that the facts which the court took judicial knowledge of did not exist and were not sufficient to authorize the action of the court in making the appointment. The effect of the action of the court was to hold that the facts that he took judicial knowledge of were sufficient to authorize and justify the appointment. The record here shows that the State has actually recovered a judgment for penalties and for cancellation of the permit to do business. The presumption will be indulged in favor of the action of the trial court, and no fact appearing in the record brought up here by the appellant which would negative and destroy the force of this presumption, we must hold that we have in this record facts sufficient to justify the judgment below." (Rec. No. 360, pp. 57 and 58.)

Again, in the decision in the main case, the Court of Civil Appeals also used the following language:

"In reference to the assignments of error complaining of the order of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute a separate appeal from that order, and this court, in considering that appeal, has decided against appellant. It is not entitled to have the order appointing a receiver reviewed by this court twice, or in two distinct proceedings." (Rec. No. 359, p. 1152.)

The effect of the decisions of the Court of Civil Appeals was plainly to make the Waters-Pierce Oil Company responsible for the legal consequences of taking a separate and distinct appeal in the receivership case and to refuse to interfere with that status over the objections of the State. While we are aware that no case can probably be found in which the discretion of the trial court in consolidating causes has been revised by this court; on the other hand, we know of no instance where this court has, in effect or terms, overruled the action of a State court in refusing to consolidate causes where the relief asked is not a matter of right. Nor do we believe that this court will now take such action in view of the considerations urged above.

Davis vs. St. L. & S. F. Ry. Co., 25 Fed. Rep., 786.

Mercantile Trust Company vs. M., K. & T. Ry. Co., 41 Fed. Rep., 8.

Toledo, St. L. & K. C. R. R. Co. vs. Continental Trust Company, 95 Fed. Rep., 505 and 506.

Central Trust Company vs. Madden, 70 Fed. Rep., 451.

Jacksonville, T. & K. W. Ry. Co. vs. American Construction Company, 57 Fed. Rep., 56.

Trustees vs. Greenough, 105 U. S., 527.

Standley vs. Roberts, 59 Fed. Rep., 836.

Young vs. Gray, 65 Texas, 100.

We next come to the consideration of the ground of objection to this motion that the appeal in this cause involves alone the validity of the order of the trial court in appointing a receiver for the property of plaintiff in error; and by the decisions of this court the mere appointment of a receiver by a State court raises no Federal question; therefore, to grant this motion to consolidate would be to burden this cause with a Federal question (if one is raised by the record in Cause No. 359), which result this court, in the exercise of a discretionary power, should not bring about.

If we do not misconstrue the case of St. L. Ry. Co. vs. Merriam, 156 U. S., 478, it is authority for the proposition that an order by which property is directed to be placed in the hands of a receiver presents no Federal question for the decision of this court. The only question really raised by the assignments of error in this appeal is the validity of the order of the trial court appointing a receiver, plaintiff in error contending that said order encounters certain clauses of the Fourteenth Amendment to the Federal Constitution, which provide that no person shall "be deprived of life, liberty or property without due process of law," and that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Upon the other hand, in the main case (No. 359) there are various errors assigned which purport to raise Federal questions of a different character and applicable only to the main judgment. Therefore, it follows that if this court should grant the motion to consolidate, it will have the effect of making this cause (No. 360) an inseparable part of the main case (No. 359), and a reversal of the main judgment would carry with it a reversal of the receivership order; or by combining the two records, this court might find reversible error as to the receivership order, when no such error was disclosed in the record brought up in this cause. In effect, this would be to burden this case with Federal questions not raised in the record of this case by which plaintiff in error should be bound as made. Such a r[illegible] It seems so unreasonable and unjust that we can not think this court will make it possible by granting this motion.

On page 6 of the brief for plaintiff in error it is argued that:

"It would be an absurdity if this court, after reversing the original judgment and the order appointing the receiver in No. 359, were obliged to say that the record in No. 360 did not disclose any of the errors by which the judgment was reversed, and that the judgment of the Court of Civil Appeals affirming the same order must therefore be affirmed; yet this difficulty may arise as a result of splitting one record in two, unless it is removed by consolidating the proceedings. For the whole record of the Court of Civil Appeals in the later case has been brought here by a writ of error in No. 360, but it contains only a part of the record of the district court."

We submit that such a difficulty could not arise if this motion

be denied. If this court should, in the main case, reverse the order appointing a receiver upon the record in that case, it would not be driven to the absurd and anomalous position of affirming the order appointing a receiver in this case. The court is the custodian of its own records and will take judicial notice of what they contain as well as its own judgments; and in such event it would make the judgment in this case conform to the legal effect of the judgment in the other. The only question which could arise would be one of costs.

In considering the last ground of objection to the motion, we think it will be an aid to this court, and especially in understanding the great importance of this motion to the State, to set out here a brief statement of the nature of the main case and of the proceedings involved in the appointment of a receiver. The State's petition alleged a conspiracy formed in the year 1870 between John D. Rockefeller, John D. Archbold, and others, to monopolize all the oil business in the United States, including Texas, and in other countries, and that to accomplish this purpose they organized the Standard Oil Company of Ohio in that year. That in pursuance of the conspiracy, the Waters-Pierce Oil Company was organized in 1878, and sixty per cent of its capital stock went into and was held by the trustees of the Standard Oil Trust, which came into existence in 1882. That in the territory sought to be exploited by the conspirators were many independent and competing firms and corporations engaged in the oil business. That the plan pursued by the conspirators was to acquire a controlling interest in these competing businesses and to place these controlling interests in the hands of a single holding company of trust known at different times by different names, among them the Standard Oil Company of Ohio, the Standard Oil Trust, and the Standard Oil Company of New Jersey. In time this plan was carried out and successfully accomplished, practically all competition being destroyed; that the Waters-Pierce Oil Company became a party to the trust in 1878 and had ever since remained a party thereto, pursuing and engaging in the common plan to destroy competition and fix and maintain prices for the sale of oil, especially in Texas. That a majority of its shares of stock were held by the Standard Oil Trust until it was dissolved. That in pursuance of the conspiracy the agreement was made between the defendant

and the other conspirators to deliver over to the Waters-Pierce Oil Company the States of Texas, Arkansas, the Territories of Oklahoma and Indian Territory, and parts of the States of Missouri and Louisiana, and the Republic of Mexico, within which territory the defendant agreed to confine its business. That the Standard Oil Company and subsidiary corporations agreed, and it was understood by and between them and defendant, that they should not sell any oil in the said territory of the Waters-Pierce Oil Company; that as a part of said contract, agreement, understanding and conspiracy, and as a consideration for the setting aside of the territory aforesaid for the exclusive use and enjoyment of the Waters-Pierce Oil Company, that company agreed to buy all of its supplies from the Standard Oil Company and companies controlled by the same. That the Standard Oil Company of New Jersey took over and acquired the Waters-Pierce Oil Company stock previously held by the Standard Oil Trust; that since the year 1892 the Standard Oil Company had owned and controlled a majority of the stock of the Waters-Pierce Oil Company, directed its affairs, limited its operations without the protest of said corporation or any corporate action on the part of the defendant resisting said control, but, on the contrary, at all times with its sanction and acquiescence and with the knowledge and consent of the stockholders. That the Standard Oil Company acquired the direction and control of a large number of corporations and firms engaged in the oil business which, but for this control, would have been competing for that business in Texas. That among the companies controlled were the Standard Oil Company of Indiana, Standard Oil Company of Ohio, Standard Oil Company of Kentucky, the Republic Oil Company, the Continental Oil Company, Waters-Pierce Oil Company, Standard Oil Company of Iowa, and many others. That the effect of such control was to destroy competition between said companies with their acquiescence and consent, and especially in the State of Texas. That said division of territory was enforced and insisted upon by the Waters-Pierce Oil Company, and acquiesced in and preserved by the Standard Oil Company and its subsidiary corporations since May 31, 1900, to the filing of plaintiff's petition. That reports were made by the Waters-Pierce Oil Company to the Standard Oil Company of all matters required to be reported by the latter comapny; that auditors were sent by the Standard Oil Company to the general offices of the

Waters-Pierce Oil Company, and checked up the books and accounts of the latter company, and said auditors made reports thereof to the Standard Oil Company showing every detail of the business of the Waters-Pierce Oil Company, all of which was done with the knowledge and approval of the defendant. That the Standard Oil Company established their refineries in Texas and that, in pursuance of the agreement and understanding above stated, the Standard Oil refineries in Texas have not been permitted and have not sold their products therein to any company except to the defendant. That by these methods the Waters-Pierce Oil Company had made itself a party to a combination to monopolize the oil business in territory which includes all of the State of Texas, and that in accordance with the plans of that combination it had actually and continuously monopolized the oil business in Texas in violation of law, from the date it received its permit to the day of trial.

This will serve to give a general outline of the State's case and the record in the main appeal contains ample evidence to support the verdict of the jury.

On the same day that the verdict was returned into court (June 1, 1907), the State applied for a receiver, the application containing among other grounds, the following:

"Fourth.—That under the judgment of ouster rendered in this cause, the defendant has no right to do business in this State and has been convicted of doing business in this State in violation of the law for each and every day since the issuance of its permit seven years ago; that it is necessary to preserve and protect the rights of the State that said business of said defendant should be conducted and carried on, at least temporarily, and be kept a going concern in this State."

On June 10th the application of the State, and the answer and response of the Waters-Pierce Oil Company were read and considered by the court, and "the court thereupon proceeded to announce his conclusions with respect to said application and defendant's objections thereto, and stated that the court would take judicial notice of the proceedings in the main case and of the rendition of judgment against the defendant for violating the anti-trust laws of the State, as charged against it in plaintiff's said second amended original petition, and that it had been found guilty of violating the said anti-trust laws on each and every

day from the 1st day of June, 1900, to the 29th day of April, 1907, and that its permit to do further business in the State had been forfeited and canceled by reason of said violations, and that defendant had since May 31, 1900, been a member of an agreement which had its very existence in Texas, in violation of the civil and criminal laws of Texas, and that it had been and still is in possession of certain instrumentalities by means of which it, in violation of the public welfare and interests, intended to continue its violation of law pending appeal from the judgment of conviction, and that the court would assume that the defendant would file its proper supersedeas bond for the said judgment of conviction, but that, notwithstanding defendant's right to so file said supersedeas bond within the time provided by law, the court was of the opinion that the Legislature had provided as a remedy or means of preventing defendant from the continued violation of the law, that a receiver should be appointed to take charge of its property and business and deprive it of the instrumentalities by which it had so violated the law, and would continue to violate the law; and that because of said statute and of the declared purpose of defendant, speaking through its general counsel, John D. Johnson, in newspaper interviews which had been brought to the attention of the court, in which said Johnson had discussed the effect of the aforesaid judgment of conviction against defendant, and had declared the purpose of defendant to appeal from said judgment of conviction and to continue to carry on its business in the same manner that it had theretofore done, notwithstanding such judgment of conviction; and without any evidence being submitted to the court in connection with said application, the court thereupon announced that it would grant said application and appoint a receiver as therein prayed for."

On June 13th the court appointed a receiver. (Rec. No. 360, pp. 21 and 22.) On June 19th the Waters-Pierce Oil Company filed its appeal bond, appealing from the order appointing the receiver. (Rec. No. 360, p. 29.)

The Court of Civil Appeals held that the act of the Texas Legislature of April 11, 1907, authorized the course pursued by the trial court in appointing a receiver and further held that independent of said act of the Legislature the court had authority to appoint a receiver under the third subdivision of Article 1465, Sayles' Civil Statutes of Texas, which subdivision is to the effect

that a receiver may be appointed where a corporation is dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights. (Rec. No. 360, pp. 56 and 57.) The provisions of said Act of 1907 are fully set out in the record. (Rec. No. 360, pp. 42 to 44.) By the fourth section of that act it was made cumulative of all other laws and did not repeal or affect older laws.

We desire here to call the attention of this court to the fact that none of the assignments of error in this record purporting to raise a Federal question assail the validity of the State statute existing before and after the passage of the Act of 1907, which the Court of Civil Appeals held to authorize the trial court to appoint a receiver independent of the later statute. Said assignments are devoted entirely to an attack on the Act of 1907 and the alleged action of the court thereunder, although the appointment of the receiver could be justified under the older law alone This was expressly decided by the Court of Civil Appeals and by the Supreme Court in denying a writ of error in the receivership appeal. (Rec. No. 360, pp. 57 and 82.) Such being the state of the record, can it be that this court will aid the plaintiff in error in raising some possible Federal question by consolidating the causes and making this case dependent upon the action in the main case in spite of the separate appeal prosecuted to this court by a separate writ of error upon the sole responsibility of the Waters-Pierce Oil Company? We can not believe this court will jeopardize the rights of the State or deprive it of an advantage made possible by the act of plaintiff in error itself.

Again, if the appointment of a receiver depended alone upon the Act of 1907, above referred to, still this court should not consolidate the causes for the reason that under the provisions of that act the appointment of a receiver was authorized in a pending suit with or without judgment, *"whenever the interests of the State may seem to require such action."* Under that authority alone the court's action in appointing a receiver was proper and legal, and, therefore, this court should deny the motion, it being based entirely upon the theory that if the main judgment can not stand the receivership order must fall with it.

The bill of exceptions filed by plaintiff in error shows clearly that the court had in mind the clause just quoted as a basis for his action in appointing a receiver. (Rec. No. 360, pp. 19 and 20.)

The Act of 1907 was not alone intended to authorize the appointment of a receiver of a corporation in cases where the State, as a lien creditor, had such an interest in its affairs as to render that course necessary, because, if so, there was no reason or excuse for its enactment, for all lien creditors had, under such circumstances, the right to procure the appointment of a receiver by the terms of the pre-existing law. Moreover, the language of the statute negatives this idea. It provides that "the court may, in any case wherein the State is suing any such corporation for the forfeiture of its permit to do business in this State, * * * appoint a receiver for such corporation whenever the interests of the State may seem to require it." In such case the State could not procure a judgment for money, and, therefore, it is plain that said statute did not confine the grounds for appointment of a receiver to mere rights of the State as a creditor. The statute by its terms authorizes the appointment of a receiver in any case of the nature mentioned, whenever the interests of the State may seem to require such action. The trial judge sat in the case throughout a prolonged trial and heard all the evidence offered by either party which was deemed relevant. He must, therefore, when he passed upon the motion for appointment of the receiver, have been in a position where he could judge intelligently and honestly exercise discretion vested in him by law to determine whether the "interests of the State" seem to require such appointment. It thus appeared to him that from the evidence the appellant had made itself a party to a combination to monopolize the oil industry in Texas. That in pursuing the plans of that combination, it had actually and continuously monopolized that business in Texas for many years, and was still doing so. That the nature of the combination into which it had entered was such that the managing officers of the Waters-Pierce Oil Company were powerless to withdraw therefrom and to conduct its own business, pending the litigation in accordance with law, even if they so desired; and it must also, from the evidence, have appeared to him that the people of Texas would, in the future, be subjected to the unlawful exactions of the oil trust, either until the business of the Waters-Pierce Oil Company was placed in the hands of one who was willing and able to conduct it in accordance with law, or until its permit to do business in the State was foreited by the final result of the litigation.

From these considerations, it results that the interest of the State might be seriously affected by the granting of this motion, especially in a matter of paramount importance to its people. If the main judgment should be reversed and this litigation is to continue over a long period of time, as would then seem probable, the instrumentalities of plaintiff in error for conducting its business should be in the hands of a receiver appointed by the State court, to the end that such business might be conducted agreeably to the laws against monopolies and conspiracies in restraint of trade, until the suit is finally determined. Otherwise, the oil company could continue to use its established business, amounting to 85 per cent of the entire oil business in Texas, and the means of carrying on same in violation of the Anti-trust Law of 1903 at the paltry risk of forfeiting $50 a day in penalties under the provisions of that act.

For all the reasons given above and in no spirit of captious opposition, but for the protection of what we regard as substantial rights of the State, we respectfully ask this court to deny the motion of plaintiff in error.

Robert V. Davidson
Attorney General of Texas.

Jewel P. Lightfoot
Assistant Attorney General.

John W. Brady
County Attorney of Travis County.

R. R. Batts

Geo. Allen
Counsel for Defendant in Error.

RECEIVERSHIP CASE.

WATERS-PIERCE OIL COMPANY,
Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

PENDING IN THE SUPREME COURT OF THE UNITED STATES; OCTOBER TERM, 1907.

And now comes the State of Texas, defendant in error, in the above entitled and numbered cause, and moves this court to dismiss the writ of error sued out in this cause to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, for the reason that it appears on the face of the record that there is no substantial Federal question involved in this cause, and that the attempted raising of a Federal question is frivolous and without merit.

STATEMENT.

This controversy was originally inaugurated by the filing on June 1, 1907, in the case of the State of Texas vs. Waters-Pierce Oil Company, pending in the district court of Travis county, Texas, of a motion or application as follows:

"And now comes the State of Texas, acting by and through her Attorney General, and the county attorney of Travis county, Texas, acting under the direction and supervision of said Attorney General, and shows to the court:

"First. That on the first day of June, 1907, in this court, in the above entitled and numbered cause, a judgment was rendered in favor of the State of Texas against the defendant, the Waters-Pierce Oil Company, for the sum of one million six hundred and twenty-three thousand nine hundred dollars ($1,623,900), and said judgment further providing for the cancellation of the permit of the said defendant to do business in the State of Texas; that said cause of action and said judgment was based upon alleged violation of the anti-trust law of the State of Texas.

"Second. That in a certain suit pending in the State of Missouri wherein the State of Missouri is plaintiff and the said above named defendant, the Waters-Pierce Oil Company, among others, is defendant, a suit was instituted for the forfeiture of the charter of said defendant,

Waters-Pierce Oil Company, for prohibiting it doing business in said State, said suit being instituted in the Supreme Court of the State of Missouri; that in pursuance to law the said Supreme Court of the State of Missouri appointed a commissioner to hear the testimony and make his report and findings of fact, and recommendation of law thereon; that, after hearing the testimony, the said commissioner found in favor of the State of Missouri on all issues in said cause, and recommended to the said Supreme Court of Missouri that the charter of the said Waters-Pierce Oil Company be canceled; that plaintiff is informed and believes that said recommendations have the force and effect of a judgment forfeiting the charter of said defendant, Waters-Pierce Oil Company.

"Third. That the penalties recovered in this cause by plaintiff, the State of Texas, can not be collected outside the State of Texas, and the property of the defendant situated in the State of Texas, as the plaintiff is informed and believes, is wholly inadequate to pay the above mentioned judgment; that the great bulk of the property within the State of Texas belonging to the defendant, subject to the payment of said judgment, consists of current accounts with merchants and dealers in the State of Texas, of tank cars, of money on hand, of oil that is easily removed, and property of that kind and character, practically the whole of it being personal, movable property, and if carried beyond the limits of this State can not be pursued by the State of Texas, and the State would have no way of collecting the above mentioned judgment; that under and by virtue of an act of the Legislature of the State of Texas, approved April 11, 1907, the State has a lien upon all of said property to secure the payment of the above mentioned judgment.

"Fourth. That under the judgment of ouster rendered in this case the defendant has no right to do business in this State, and has been convicted of doing business in this State in violation of the law for each and every day since the issuance of its permit seven years ago; that it is necessary to preserve and protect the rights of the State that said business of said defendant should be conducted and carried on, at least temporarily, and be kept a going concern in this State.

"Wherefore plaintiff requests the court to appoint a receiver to take charge of all the property and assets of every kind, character and description of the defendant situated within the State of Texas; pending the hearing of this application, that this court grant its most gracious writ of injunction, restraining and prohibiting the defendant, its officers, agents, attorneys and employes, or any of them, from removing from the State of Texas any part of the property or assets of said defendant situated within the State of Texas."

After a hearing, certain orders were made by the court, which were amended by an order entered on June 15, 1907, which amended order is as follows:

"And now, on this 15th day of June, A. D. 1907, at a regular term of this court, it is considered, ordered, adjudged and decreed by the court that the orders of this court made and entered in said cause on the 10th day of June, A. D. 1907, and on the 13th day of June, A. D. 1907, be so amended as to hereafter read as follows:

"And now, on this 10th day of June, 1907, at a regular term of this court, there came on to be heard the application of the State of Texas for the appointment of a receiver of the property and assets of the Waters-Pierce Oil Company, a corporation, pending the further disposition of this cause, and the court, after duly considering said application, is of the opinion that the prayer should be granted and a receiver appointed to take charge of all the property and assets of the defendant, the Waters-Pierce Oil Company, situated within the State of Texas, or that may hereafter come within the State of Texas, and that such receiver shall immediately take charge of all of said property and assets, and hold the same subject to the further orders of this court, and said receiver is hereby directed and instructed to continue and carry on the business of the defendant until such future time as the court may direct, keeping and preserving the property coming into his custody and carrying on the business of marketing and supplying oil to the public in the State of Texas, with the right, power and authority to continue the various clerks, servants and agents of every class and grade now in the employ of the defendant or to discharge them and employ others at his discretion, and to require such bonds and security to himself as receiver from any of the present employes or those thereafter engaged by him as he may think expedient and proper; and to sell the present stock of oil and other products and personal property in the hands of the defendant and which may come into his hands as receiver, and to purchase and sell other oil, products and personal property in the regular course of business of the defendant to the same effect as the defendant could or might have done in the continuation of said business, so that said business may be kept up to its present condition as near as may be; and the said receiver shall have power, under the control of the court, to bring and defend actions in his own name as receiver, to take charge and keep possession of the property, to insure the same against loss and destruction by fire or otherwise as he may deem proper, to receive rents, collect, compound for, compromise demands, employ one or more attorneys at law, make transfers and generally to do such acts respecting the property as the court may authorize, and all the expenses of said receivership, including taxes, insurance premiums, attorneys' fees,

his own compensation and all expenses of said receivership to be paid as a part of the court costs of the suit. That the temporary injunction heretofore granted, prohibiting the defendant from moving any of its property and assets beyond the limits of the State of Texas, be, and the same is hereby, continued in force until the further orders of this court.

"To all of which action the defendant in open court excepts, and in open court gives notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas.

"And on this 13th day of June, A. D. 1907, the court confirming said order, and in pursuance thereof, names and appoints as receiver herein of the property in said order described Robert J. Eckhardt, who is a resident of the county of Williamson, in the State of Texas, with the duties and powers therein named, and fixes the amount of his bond as such receiver at two hundred and fifty thousand dollars ($250,000), to be made payable to the judge of this court, and his successors in office, for the use of all parties interested in said property and this suit."

From this order appointing a receiver, the Waters-Pierce Oil Company prosecuted an appeal to the Court of Civil Appeals, assigning as errors committed the following, which were all the errors assigned which undertook to raise a Federal question:

> "The court erred in disregarding the supersedeas bond filed by defendant in connection with its appeal from the main judgment recovered against it on June 1, 1907, and in requiring defendant to file the additional bond in the sum of $100,000, to supersede the orders appointing the said receiver and to avoid having to surrender its property to said receiver by reason of said appointment; and this action on the part of the court was without lawful warrant and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the effect of such action by the court was to deprive the defendant of its property without due process of law and to deny to it the equal protection of the law."
>
> "The said act of the Legislature of the State of Texas, approved April 11, 1907, is unconstitutional, null and void, in so far as it attempts to create a lien upon appellant's property for the alleged violation of the anti-trust laws of said State, in that the lien is not created by the terms of the act, based alone upon the commission of the offense, but is left to be created by the action of the prosecuting officer in filing suit to recover the prescribed penalties."
>
> "The statute, therefore, does not prescribe a fixed and uniform rule of law, applicable to all persons alike, but is a delegation to create the lien, or not create it, and discriminate between persons at will; and the appointment of the receiver to take charge of appellant's property under this statute results in depriving appellant of its property without due process of law, and in denying to

it the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provisions of the Constitution of the United States are here urged and relied upon by appellant as against the validity and application of said act of the Legislature of the State of Texas to the matters involved in this case, and to the act of the court in appointing the said receiver thereunder."

"The act of the Legislature of the State of Texas approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in so far as it attempts to create a lien upon this defendant's property for acts committed before the said act took effect, in violation of Section 16, Article 1, of the Constitution of the State of Texas."

"The act of the Legislature of the State of Texas approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in that it attempts to create a lien upon this defendant's property for acts committed before said act took effect, in violation of Section 10 of Article 1, of the Constitution of the United States, which denies to any State the right to pass an *ex post facto* law, and the court erred in considering said act as the basis of its orders appointing the said receiver."

"The said act of the Legislature of the State of Texas, approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in so far as it authorizes the appointment of a receiver in a suit brought to recover a personal judgment in which no lien upon defendant's property was set up and adjudicated, and the action of the court in appointing the said receiver in this cause was in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it results in depriving defendant of its property without due process of law and in denying to defendant the equal protection of the laws."

"The said act of the Legislature of the State of Texas, approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void, in so far as it authorizes the appointment of a receiver in a suit brought against a defendant to recover fines and penalties for offenses committed in violation of the anti-trust laws of the State, as a means of preventing the defendant from the further or continued violation of such laws, and the action of the court in appointing a receiver for defendant's property on that ground and for that purpose, as indicated in the opinion of the court at the time said appointment was made, was unauthorized in law, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the result of said action was and is to deprive the defendant of its property without due process of law and to deny to defendant the equal protection of the laws."

"The court erred in appointing the said receiver without any evidence being introduced before it at the time said appointment was made, to show that defendant did not intend to change its

status and methods of doing business so as to conform to the laws of the State of Texas, and without evidence affirmatively showing that defendant could not make use of its property and carry on its business in accordance with law, and in holding that the court was authorized to so appoint a receiver for defendant's property in the State of Texas and deprive defendant of the instrumentalities by which it had been convicted of violating the laws of said State, based upon its past conduct and the said judgment of conviction rendered against it on June 1, 1907."

"Wherefore, defendant says that the said action of the court was unauthorized and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and has the effect of depriving defendant of its property without due process of law and in denying to it the equal protection of the laws."

"The act of the Legislature of the State of Texas, approved April 11, 1907, being Chapter 87 of the General Laws of the State of Texas, passed by the Thirtieth Legislature at its regular session, in so far as it authorizes the appointment of a receiver of appellant's property in this suit or prosecution instituted against appellant prior to the passage of said act, and for offenses alleged to have been committed prior to its passage, is unconstitutional, null and void, in that it violates the tenth section of Article 1 of the Constitution of the United States, which provides that no State shall pass a bill of attainder or an *ex post facto* law."

Upon a hearing of the cause, the Court of Civil Appeals rendered an opinion affirming the judgment of the district court in appointing a receiver in the following language:

"Fisher, C. J.—This is an appeal by the appellant from an order entered by the trial court appointing a receiver for the properties of the appellant company situated within the State of Texas. The history of the proceeding and the subject matter of controversy and the result reached by the trial court is fully explained and set out in the opinion of this court handed down in this case on June 28, 1907. There is also set out in that opinion the act of the Legislature of April 11, 1907, which we there construed and held to authorize the course pursued by the trial court, which is objected to in the appeal we are now considering. It is unnecessary for us to recapitulate what was stated in the opinion referred to. We there, in effect, held that the act of the Legislature referred to was constitutional, which ruling, after further consideration, we adhere to. The act in question clearly authorized the procedure pursued by the trial court, and the spirit, meaning, and purpose of the act authorized the court, upon dissolution of the permit to do business within this State of the appellant's company at the instance of the suit by the State, to appoint a receiver for its property within its jurisdiction. The reason for this conclusion we undertook to state in the opinion referred to, which agrees with the conclusion of the trial judge,

as stated in the bill of exception which is a part of the record in this case.

"Independent of the power conferred by the act of the Legislature reviewed, we are of the opinion that the court had the authority to appoint a receiver by virtue of Subdivision 3 of Article 1465, Sayles' Civil Statutes, 1897. That subdivision is to the effect that a receiver may be appointed where a corporation is dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. The corporate right of the appellant company to do business within this State was by virtue of a permit that had been granted to it by the State, and, when an action is brought by the State to cancel and dissolve that permit, it is a proceeding which in our opinion comes within, if not the exact letter, the spirit and meaning of that part of the subdivision of the statute which relates to the forfeiture of the corporate rights of the corporation.

"It is contended by the appellant that in the appointment of the receiver the trial court proceeded without pleading and evidence. The record and proceedings brought to this court by the appellant for our review contains no statement of facts, but there is a bill of exception which was approved by the court, in which it is stated that the court, in passing upon the question of the appointment of the receiver, took judicial notice of the facts exhibited in the main case upon which the receivership is predicated, and of the judgment and decree rendered in that case, wherein it appears from the record in this case the judgment against the appellant corporation was for a large sum, and also for forfeiting its permit to carry on and conduct its business within this State. That branch of the case in which the receiver was appointed is merely an arm of the main case, and is incidental to that proceeding. Both of the statutes quoted and mentioned authorize and empower, if they do not expressly direct, the trial court to appoint a receiver when the State obtains its judgment canceling the permit. And there is another provision of the Act of 1907 which authorized a receiver to be appointed when the interests of the State might require it to be done. In view of these statutes, it is folly so say that the trial court must lose sight of the main controversy when he undertakes to appoint a receiver, and that before that jurisdiction can be exercised he must again rehear and review the facts that were established in the original case upon which the receivership depends; and we are of the opinion that the court was correct in the conclusion that it could take judicial knowledge of the facts established in the main case and the judgment based thereon. The appellant has seen fit to perfect a separate appeal from the order appointing a receiver, and it has no statement of facts in the record showing that the facts which the court took judicial knowledge of did not exist and were not sufficient to authorize the action of the court in making the appointment. The effect of the action of the court was to hold that the facts that he took judicial knowledge of were sufficient to authorize and justify the appointment. The record here shows

that the State has actually recovered a judgment for penalties and for cancellation of the permit to do business. The presumption will be indulged in favor of the action of the trial court, and, no fact appearing in the record brought up here by the appellant which would negative and destroy the force of this presumption, we must hold that we have in this record facts sufficient to justify the judgment below.

"It is contended by the appellant not only that the facts are not sufficient, which contention we have just disposed of, but that the appointment was made by the court without being predicated upon any pleading in the nature of a petition or bill by the State asking for and showing grounds for the appointment of a receiver. The document filed by the State upon which the court acted in making the appointment we construe to be of the nature of a pleading. It is addressed to the court, and states facts under the statutes discussed that would authorize the court to appoint a receiver. A general demurrer was interposed, it seems, to this application, and was overruled. It states grounds and reasons why the court should make the appointment, and some of these reasons stated are of the nature embraced in the statutes upon which a court may act in making the appointment. But, however, if it could be held that the application of the State could not be regarded as a petition or a bill or something in the nature of a pleading requesting the appointment of a receiver, or if an instrument of this character but fatally defective, then the question in the case of forfeiture of the franchise or permit and the power of the court to appoint a receiver is set at rest by the case of San Antonio Gas Co. vs. State, 22 Texas Civ. App., 118, 54 S. W. Rep., 293. It is there, in effect, held that where there is a judgment forfeiting the corporate rights the court can, independent of the request of any one, exercise his judicial discretion as to whether he will or will not appoint a receiver. It is unnecessary to repeat that the court in that opinion says upon the subject. The proposition is forcibly discussed, and the ruling is squarely to the effect that the court can, without request, make the appointment in such a case.

"As said before, we find no constitutional objection to the statutes under which the court acted in making the appointment. What we have said is all that we think necessary to be said in disposing of this appeal."

Thereafter, the Waters-Pierce Oil Company filed a motion for a rehearing of the cause in the Court of Civil Appeals, in which they for the first time undertook to raise a Federal question on the action of the court in appointing a receiver by virtue of Subdivision 3, Article 1465, Sayles' Civil Statutes of Texas, their assignments calling in question the action of the court in this regard, being as follows:

"This court erred in holding that the said district court was authorized to appoint a receiver to take charge of appellant's

property by virtue of Subdivision 3, Article 1465, Sayles' Civil Statutes of Texas, which is to the effect that a receiver may be appointed where a corporation has forfeited its corporate rights, because treating, as the court did, the cancellation of the permit of appellant to do business in the State of Texas as the forfeiture of the corporate rights of appellant, such forfeiture was made by virtue of the judgment of said district court entered June 1, 1907, in the main suit convicting appellant of violating the anti-trust laws of the State of Texas, and was a part of that judgment; and further because the appellant having superseded the execution of said judgment in such manner that no process could be issued or proceedings had in aid of its enforcement from the date of its rendition, the appointment of the receiver to take charge of appellant's property was without authority; and because further to sanction and sustain the appointment of the receiver and to hold that said appointment has any legal effect, results in denying to appellant the benefit and protection which all other litigants enjoy under the laws of the State of Texas by superseding a judgment, and would, therefore, be unconstitutional and in violation of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws."

"This court erred in holding that Subdivision 3, Article 1465 of the Revised Statutes of the State of Texas has any application to the appointment of the receiver involved in this appeal, because the said subdivision of said article has no application to the cancellation of the permit of appellant as a foreign corporation, and it has the right to continue in possession and enjoy the use of its property after the cancellation of its permit, and may conduct a business protected under the Commerce Clause of the Constitution of the United States, and may sell or remove its property at will, and to deny to it the possession and use of its property for these purposes by the appointment of a receiver to take charge of its property, as was done under the orders of the said district court and affirmed by the judgment of this court, results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

"This court erred in holding that the appointment of the receiver in this proceeding at the suit of the State was authorized by the said act of the Legislature of the State of Texas, approved April 11, 1907, and also under the provisions of Subdivision 3, Article 1465 of the Revised Statutes, independent of the rights of the State as a creditor having a legal interest in appellant's property, and since the judgment of the State against appellant was secured by the supersedeas bond given by appellant upon said judgment, as required by law, the State had no such interest in appellant's property as to authorize the appointment of a receiver, and both of said statutes, when construed as authorizing the appointment of a receiver for appellant's property, are unconstitu-

tional, and this action of the court based thereon results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

"This court erred in its findings and conclusions of law in holding that the district court was authorized at the hearing of the application for the appointment of a receiver in this proceeding, to consider the evidence which was submitted in the main cause, and that the appointment of the receiver herein should be affirmed, based upon the presumption that sufficient evidence was introduced at the hearing of the main cause to show that the interests of the State of Texas required such appointment. This holding on the part of the court was erroneous because if the trial court could take judicial notice of what occurred in the main cause, this court is also required to take like notice thereof, and this can only be done by considering the appointment of the receiver in connection with the appeal in the main cause now pending before this court. This holding is also erroneous because the application upon which the appointment was made did not set out any facts showing that the State had any interest requiring the appointment of the receiver beyond the collection of its judgment, and the act of this court in sustaining the appointment based upon the presumption that something may have been shown at the hearing of the main case, although it was not set out in the application, results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States."

This motion was overruled without any written opinion.

After the overruling of the motion for rehearing in the Court of Civil Appeals, an application was made for a writ of error to the Supreme Court of the State of Texas, and this application was denied without any written opinion. The Waters-Pierce Oil Company thereupon presented to one of the Justices of this court a petition for writ of error to the Court of Civil Appeals, which was granted, and this cause is here for submission upon the above set out assignments of error.

Argument.

The question is, in view of what is in controversy in this cause: Is there a substantial Federal question involved in this proceeding? The court will bear in mind that the purposes sought to be accomplished by the receivership were several:

1. To preserve the property of the Waters-Pierce Oil Company, so that the State could have something out of which to make its claim when the litigation was finally terminated.

2. To enforce the judgment of ouster that had been rendered.

3. To preserve the property for the benefit of all interested parties, pending the final disposition of the cause.

As will be noted from the opinion of the Court of Civil Appeals affirming the order appointing a receiver, it is said that, independent of any powers conferred on the trial court by the act of the Legislature of the State of Texas, approved April 11, 1907, the trial court had authority to appoint a receiver by virtue of Subdivision 3 of Article 1465 of the Revised Civil Statutes of Texas, which is as follows:

"Receivers may be appointed by any judge of a court of competent jurisdiction in this State in the following cases: * * *

"3. In cases where a corporation has ben dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights."

This act was passed in 1887, thirteen years before the Waters-Pierce Oil Company applied for a permit to do business in Texas, its permit having been granted on May 31, 1900.

The court by its order appointing a receiver did not *take* the property of the Waters-Pierce Oil Company. It simply ordered it seized or sequestered in the interest of all parties concerned, and give instructions for its proper management and preservation, pending the final disposition of the whole matter. There was no divestiture of title. Indeed, we can perceive of no case where a receiver is appointed in the ordinary way simply to preserve and hold the property subject to final adjudication as to who is entitled to it, that can ever raise a Federal question, because it is not taking property or depriving any one of property, but it is preserving it to await the future action of the proper tribunals.

As will be noticed in the original assignments of error upon which the case was submitted in the Court of Civil Appeals, no attempt whatever is made to raise a Federal question as to the authority of the court to appoint a receiver by virtue of Subdivision 3 of Article 1465 of the Revised Civil Statutes of Texas, and the attempt to raise such question, we think, comes too late in a motion for a rehearing when it does not appear that the Court of Civil Appeals considered and passed upon said attempted raising of a Federal question. But even if they could be considered, it is apparent that there is no substantial Federal question involved.

But it is insisted in the original assignments of error raised in the Court of Civil Appeals that there was a Federal question involved, in that the acts of the Legislature of April 11, 1907, were in violation of the Constitution of the United States, in that it was an *ex post facto* law and undertook to deprive the Waters-Pierce Oil Company of its property without due process of law and denied it the equal protection of the law, in that said act undertook to give a lien for penalties that had accrued prior to its passage. It is only necessary to say that the question

is not involved in this case, because it was not passed on either in the trial court or in the Court of Civil Appeals, and will arise only when the court comes to pass upon the lien claimed by the State of Texas upon the property of the Waters-Pierce Oil Company. That occasion may never arise, and until the State courts have passed upon the question of the constitutionality of that act, in so far as it attempts to assert such lien, there is no Federal question to be reviewed by this court.

It is not an answer to say, that the judgment or order directing the appointment of a receiver must depend upon the validity of the judgment in the main case. It does not depend upon the validity of the judgment in the main case. If the Waters-Pierce Oil Company had wanted to have the Texas courts and this court review in one proceeding all the questions involving the validity of the judgment and the statutes upon which it was based in the main case, it could have done so by prosecuting one appeal, as has been held by the Supreme Court and the Court of Civil Appeals of the State of Texas. They did not choose to do so, but prosecuted separate appeals, treating the order appointing a receiver as an independent proceeding, separate and distinct from the judgment of ouster and for penalties. This they had a right to do, as stated, and, therefore, nothing can be considered in the record in this case, except what actually appears therein. A sworn petition, whose material allegations were not denied, was presented to the court. This petition showed every ground which authorized the appointment of a receiver under Subdivision 3 of Article 1465 of the Revised Statutes of Texas, namely, (1) insolvency, because it was shown that the debt of the State exceeded its assets, so far as the State of Texas was concerned; (2) imminent danger of insolvency, because of the character of the property of the defendant; and (3) forfeiture of its corporate rights.

It is unnecessary to speculate as to what the judgment of this court will be in the main case, because, if the judgment of the State courts be reversed, it will only be as to penalties, because this court has already held in the case of Waters-Pierce vs. The State of Texas, that even though the anti-trust acts under which a foreign corporation was being prosecuted were unconstitutional and void, yet a judgment of ouster could be sustained and would be sustained, because the State had the authority to arbitrarily cancel a permit granted to a foreign corporation to do business in the State. (See Waters-Pierce Oil Company vs. The State of Texas, 177 U. S., 28.) Now we can, therefore, assume that, irrespective of any questions raised in the main case, the judgment of ouster will stand, it having been affirmed by the highest courts in the State of Texas, and it will, therefore, be necessary and proper for a receiver to wind up the affairs of this corporation, so far as the State of

Texas is concerned, and have its citizens and all the claimants, including the State of Texas, given the right to assert and litigate their claims in the receivership. This would be proper even should the Waters-Pierce Oil Company today abandon its appeal in the main case and pay off that judgment, because it is for the State court that has seized the property in the first instance to pass upon and decide all questions relating to the disposition of the property and the winding up of its affairs, and hear and settle any controversy affecting such property of the Waters-Pierce Oil Company as comes under the custody or control of the State courts, and it would be for that court to decide when the proceedings should be terminated and its receiver discharged. So it is no answer to the contention of the State to say, that it is amply secured by a bond, because this bond only secures this judgment and does not protect or secure any other creditors whose claims might have arisen in the State of Texas and over which the State court could and would assume jurisdiction.

We, therefore, respectfully ask that the writ of error be dismissed.

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Office Supreme Court, U. S.
FILED.
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In the Supreme Court of the United States

OCTOBER TERM, 1908

No. 359 AND 360

WATERS-PIERCE OIL COMPANY . PLAINTIFF IN ERROR

AND

STATE OF TEXAS . . . . . DEFENDANT IN ERROR

BRIEF FOR THE PLAINTIFF IN ERROR

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In the Supreme Court of the United States

OCTOBER TERM 1908

Nos. 359 and 360

WATERS-PIERCE OIL COMPANY . . . PLAINTIFF-IN-ERROR

AND

STATE OF TEXAS . . . . . DEFENDANT-IN-ERROR

BRIEF FOR THE PLAINTIFF-IN-ERROR

These two causes arise upon two successive appeals in an action (No. 24,551) in the District Court of Travis county in Texas brought by the State of Texas against the Waters-Pierce Oil Co., which was incorporated under the laws of Missouri on the 29th May 1900, for cancellation of its permit to do business in Texas and for penalties on account of acts alleged to have been done by it in violation of the Texas "Anti-Trust Laws" of 1899, c. 146, and 1903, c. 94 (*Record*, No. 359, p. 2).

These two statutes are set out in full in an Appendix at the end of this brief, pp. 213, 220.

Judgment in the action was given against the Waters-Pierce Oil Co. on the 1st June 1907 for penalties in the sum of $1,623,900 and for cancellation of its permit to do business in Texas (*Rec.* No. 359, p. 314). The defendant appealed from this judgment to the Court of Civil Appeals and gave a supersedeas bond in the sum of $3,275,000 (*id.* p. 319–322).

In the same action after the original judgment the District Court made an order appointing a receiver of the property of the Waters-Pierce Oil Co. (*Rec.* No. 359, p. 327–329; *Rec.* No. 360, p. 5–8), the judge stating that he

did so in order to deprive the defendant of the instrumentalities by which it would otherwise continue its violations of law which had been established by the judgment (*Rec.* No. 359, p. 341; *Rec.* No. 360, p. 19–20). The Waters-Pierce Oil Co. appealed from this order to the Court of Civil Appeals and gave a further supersedeas bond in the sum of $100,000 (*Rec.* No. 359, p. 327–329, 349; *Rec.* No. 360, p. 6–8, 28).

In the Court of Civil Appeals one transcript of the whole record was filed containing all the proceedings in the action, including both appeals (*Rec.* No. 359, p. 395), and another transcript of only so much of the record as relates especially to the appointment of the receiver (*Rec.* No. 360, p. 36). That court, having refused a motion to consolidate them, advanced the second appeal for hearing upon the latter transcript and affirmed the orders regarding the receiver (*Rec.* No. 360, p. 55–57, 64), and afterwards heard the matters contained in the transcript of the whole record and affirmed the judgment of the lower court (*Rec.* No. 359, p. 1162, 1187).

The Supreme Court refused applications for writs of error (*Rec.* No. 359, p. 1187; *Rec.* No. 360, p. 82), and the writ of error in No. 359 (*Rec.* p. 1213) in this Court was brought upon the judgment of the Court of Civil Appeals upon the transcript of the whole record, and that in No. 360 (*Rec.* p. 108) upon the judgment of the same court upon the transcript of the part relating to the receiver.

Although the two appeals were thus separated by the Court of Civil Appeals, the Supreme Court of the State afterwards held that the appeal from the order appointing the receiver might have been dealt with in the appeal of the principal case and that the separation of the two did not deprive the defendant of the benefit of a review of the order accordingly (opinion in *Rec.* No. 360, p. 75).

As there were thus two separate records in the Court of Civil Appeals in which that court had given separate judgments, it was necessary for the defendant to bring two writs of error in this Court, so that the order appointing the receiver, which was in the nature of execution upon the judgment, might not be put in force while this Court was considering the validity of the judgment upon which it depended. But a motion has been made in this Court to consolidate the two causes so that they may be considered as one cause, as they ought to have been in the Court of Civil Appeals.

The claim of the State is set out in a petition originally filed in the District Court on the 22nd September 1906 (*Rec.* No. 359, p. 1), and amended on the 29th April 1907 (p. 2), which describes the defendant (p. 2) as "the Waters-Pierce Oil Company, acting as and purporting to be a corporation, and claiming, acting and purporting to be incorporated under and by virtue of a charter granted and issued by the State of Missouri on the 29th day of May A. D. 1900, and doing business in Texas and claiming to have authority to do business in Texas by virtue of a permit issued by the Secretary of State of the State of Texas on the 31st day of May A. D. 1900." The petition alleges,

> That about January 1st 1870 J. D. Rockefeller, J. D. Archbold, H. H. Rogers, W. Rockefeller, H. M. Flagler, and a number of other persons (the names of some of whom are mentioned at p. 3), conceived the scheme of monopolising and controlling the business of refining, transporting, and selling petroleum and its products throughout the United States, including Texas, and to that end they entered into a conspiracy and a series of conspiracies among themselves and by and with other individuals and corporations, *including the defendant* corporation, from that time up to the date of filing the amended petition (*id.* p. 2);
>
> That to that end about May 7th 1878 those parties and W. H.

Waters and H. C. Pierce and the Chess-Carley Co. and the Standard Oil Co. (of Ohio) entered into a further conspiracy as afterwards set out (*id.* p. 2–3);

That on May 7th 1878 W. H. Waters and H. C. Pierce were engaged in the business of refining and selling petroleum and its products in Missouri and Texas and elsewhere and the Chess-Carley Co. and the Standard Oil Co. (of Ohio), the last-named being controlled by the conspirators first-named, were engaged in the sale of the same in Missouri and Texas and elsewhere (*id.* p. 4), and on that day they entered into a conspiracy to control and monopolise the oil business in that section, including Texas, and to control the price of oil and eliminate competition there, and for that purpose formed a corporation by the name of the Waters-Pierce Oil Co. under the laws of Missouri, its charter being issued on May 7th 1878, and the capital being $100,000 divided into 1000 shares of $100 each, of which 400 shares were issued to W. H. Waters and H. C. Pierce, 400 shares to the Chess-Carley Co. and 200 shares to the Standard Oil Co. (*id.* p. 5);

"That the company then organised *is in fact the same company* doing business under a reputed reorganisation with a charter dated May 29th 1900; that *allegations* of facts occurring *prior to* May 29, 1900, are with reference to said company under its original charter, and occurring *since* then with reference to the company as acting under the charter of that date; and the company as reorganised *adopted* all the acts, *carried out* and is carrying out all the contracts, schemes and conspiracies of the company as originally organised, and in every way *has taken the place* of the company as originally organised" (*id.* p. 5);

[*Note.*—In accordance with this interpretation clause, the allegations of the petition must not be taken as referring to *the defendant* unless the matters alleged occurred on or after the 29th May 1900, when the defendant first came into existence. As to all other matters the allegations relate to the *former company* of the same name, which will be designated in this brief as the *old* Waters-Pierce Co. or by a similar expression.]

That prior to this date the conspirators had organised the Standard Oil Co. (of Ohio) and secured control of a large num-

ber of corporations and firms and apportioned the territory of the United States to such corporations as they saw fit for the transaction of the oil business (*id.* p. 5);

That in pursuance of the plan and conspiracy, when the [old] Waters-Pierce Oil Co. was formed, it was agreed and understood (and the agreement has been *acquiesced in and acted upon* by the defendant since its organisation) that the former company was to confine its business to the states of Texas, Arkansas, the territory of Oklahoma and Indian territory and parts of Missouri and Louisiana, and Mexico, and was not to do business in other parts of the United States or elsewhere, and that the Standard Oil Co. (of Ohio) or any of its dependent companies or other companies set forth in the trust agreement of 1882 should not sell any oil or products of petroleum or do any business in products of oil in this territory of the [old] Waters-Pierce Co. (*id.* p. 6);

That as a part of the agreement and as a consideration therefor the [old] Waters-Pierce Co. agreed to purchase all its supplies from the Standard Oil Co. and companies controlled by it, which agreement was *enforced* and has always been *observed* by the defendant since its incorporation (*id.* p. 6);

That in pursuance of the conspiracy certain *trust agreements* were entered into by certain persons, firms, and corporations, including the [old] Waters-Pierce Co., on or about the 2nd and 4th January 1882. By the former (*id.* p. 7, A), which was expressed to be intended to embrace (1) all the members of certain corporations and limited partnerships and of such others as might join, (2) certain individuals, and (3) a portion of the members of specified corporations and limited partnerships, among which was the [old] Waters-Pierce Co., it was agreed that a corporation should be formed in each of the states of Ohio, New York, Pennsylvania, and New Jersey, and also, when it seemed advisable to the trustees, in other states, to be known as the Standard Oil Co. of that state, but any existing charter might be used for the purpose (*id.* p. 8–9), that all the property in each state of the corporations and limited partnerships mentioned in class 1 and of the individuals in class 2 should be transferred to the Standard Oil Co. of that state, for which shares of that company equal at their par value to the appraised

value of the property transferred were to be issued to trustees and trust certificates were to be issued by the trustees to the persons entitled thereto, and the persons in class 3 should transfer all their shares in the corporations or limited partnerships to the trustees and receive for them the value in trust certificates at par (*id.* p. 9–10), and it was made the duty of the trustees to receive all the interest and dividends and to distribute the money received by paying dividends as they judged proper (*id.* p. 13). By the other agreement (*id.* p. 16, B) it was provided that the trustees might decide what companies should convey their property as provided in the previous agreement and when they should do so, and in the meanwhile each company should remain in existence and retain its property and business, and the trustees should hold the stocks thereof as provided in the previous agreement;

That the *defendant* [meaning the *old* Waters-Pierce Co.] *so entered into and became a party* to the conspiracy and observed and performed the same up to the present time, and that the stock held by the Chess-Carley Co. and the Standard Oil Co. was transferred to the trustees under the agreements (*id.* p. 18);

[*Note.*—It was agreed at the commencement of the trial (*id.* p. 399) that the old Waters-Pierce Co. did not sign either of these agreements, and that H. C. Pierce, who then owned 40 per cent. of the stock, did not sign either of them or deposit any part of his stock, and that H. A. Hutchins and W. P. Thompson, who owned 40 per cent., and the Chess-Carley Co., who owned 20 per cent. of the stock, deposited their shares under the agreement, and that the Standard Oil Trustees from that time until 1892 held 60 per cent. of the stock.]

That on the 13th June 1882 the [old] Waters-Pierce Co. increased its capital from $100,000 to $400,000, and the new 3000 shares were issued as to 600 shares to the Chess-Carley Co., 1200 shares to W. H. Waters, and 1200 shares to the Standard Oil Trustees, who from the time of the agreements chose such directors of the company as they saw fit and controlled its actions and the management of its business (*id.* p. 18–19);

That the [old] Waters-Pierce Co. *never took any corporate action* or made any complaint against its stockholders or officers

entering into the trust agreement or surrendering their stock and receiving the trust certificates, nor against any of the acts recited in the petition, but on the contrary the company in its corporate capacity has, and all its officers and stockholders have *acquiesced* in such transfer and exchange as well as the other acts (*id.* p. 19);

That the Standard Oil Trustees controlled and managed the affairs of the [old] Waters-Pierce Co. without protest or resistance by the company, but on the contrary with its sanction and acquiescence, and the consent of its stockholders up to March 2nd 1892, when the Standard Oil Trust was ousted from Ohio by a judgment and voted to go into voluntary dissolution (*id.* p. 20);

That the Standard Oil Co. of New Jersey (name subsequently changed to Standard Oil Co.) then took over the entire holdings of stock, including that in the [old] Waters-Pierce Co., previously held by the trustees, and thereafter and up to this time has performed the functions of the trustees, and controlled the affairs of the "defendant" with its sanction and acquiescence and the knowledge and consent of its stockholders (*id.* p. 20);

That prior to the 6th July 1889 and continuously thereafter until the 31st May 1900 the [old] Waters-Pierce Co. did business in Texas, having in accordance with law secured a permit for that purpose, and, while so engaged in business, violated the statutes against illegal combinations and thereby incurred a forfeiture of its permit, and a judgment cancelling its permit was rendered by the District Court of Travis county, which was affirmed by the Court of Civil Appeals, and afterwards on March 19th 1900 by this Court (*id.* p. 21) [*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28];

That for the purpose of maintaining the monopoly and defrauding the State of Texas and fraudulently rendering ineffective the judgments of the courts, the officers of the Standard Oil Co., the [old] Waters-Pierce Co., and H. C. Pierce, and the other conspirators determined to go through the *form of dissolving* the [old] Waters-Pierce Co. and of *creating a new corporation* for the transaction of its business (*id.* p. 21);

That a paper was prepared certifying the dissolution of the [old] Waters-Pierce Co. and filed with the Secretary of State of

Missouri May 29th 1900, "and *another charter* was taken out by the old stockholders, giving the same name, and the purposes, and *being in fact* the same corporation" (*id.* p. 21–22);

[*Note.*—The plaintiff then alleges that the old Waters-Pierce Co. was not dissolved in accordance with the laws of Missouri, and sets out certain statutes, which are alleged to provide the only way whereby a corporation could be dissolved there, and which were not complied with (*id.* p. 22–23). But *the answer* alleges that by another statute a corporation could be dissolved by unanimous consent of its stockholders and that the old Waters-Pierce Co. was dissolved accordingly on the 28th May 1900 (*id.* p. 93–95), and that the plaintiff was precluded from questioning the dissolution by a judgment dated the 5th November 1900 in an action by the plaintiff against the old Waters-Pierce Co. by which it was held that that company had been legally dissolved (*id.* p. 85; copy of judgment at p. 95). No *evidence* was adduced by the State in support of its allegations that the *old* Waters-Pierce Co. was not properly dissolved.]

That the stock of the [old] Waters-Pierce Co. at the time of the dissolution was held, as to 1250 shares by H. C. Pierce, as to 2750 shares by the Standard Oil Co. of New Jersey (*id.* p. 23);

That in the charter issued May 29th 1900 the five directors were the same as in the old company with one exception, and that "of the new stock, as of the old, H. C. Pierce was to own 1250 shares and the Standard Oil Co. of New Jersey was to own 2750 shares, all of which was effected" (*id.* p. 23–24);

That for the nominal capital under the new charter the cheque of H. C. Pierce was given for $400,000; that the company at the time of the dissolution had in cash more than $400,000 which was nominally paid to the stockholders as a dividend and afterwards returned to the new company for the discharge of the $400,000 capital; that "H. C. Pierce was reimbursed by the Standard Oil Co. for the entire amount of money *advanced* by" him in his cheque [*i. e.* for the 2750 shares for the Standard Oil Co., see the evidence, *id.* p. 489, 493]; that the cheque was given by H. C. Pierce "to deceive the public and cover up the real transaction and fraud perpetrated upon the State of Texas" (*id.* p. 24);

That, in pursuance of a previous understanding that "the 2750 shares theretofore owned by the Standard Oil Co." should be transferred to it immediately after the reorganisation, the 2750 shares of the alleged new incorporation "were endorsed in blank by said H. C. Pierce and placed under the control of the Standard Oil Co.," but they remained on the books of the company in the name of H. C. Pierce until June 1904, except two shares which were held by two representatives of the Standard Oil Co. in the directorate; and from May 29th 1900 to June 1904, while the stock so stood in his name, H. C. Pierce, in order to deceive the public and secrete the true ownership of the 2750 shares, collected the dividends both on his own 1250 shares and the 2748 shares standing in his name and owned by the Standard Oil Co. and transmitted to the Standard Oil Co. the dividends belonging to it; and all this was done "with the knowledge and sanction of the defendant" (*id.* p. 24–25);

That in June 1904 the 2748 shares were transferred on the books of the defendant into the name of M. M. Van Beuren, who has since held them for the benefit of the Standard Oil Co., and that all the aforesaid transactions were effected with the knowledge and sanction of the defendant (*id.* p. 25);

That the conduct of the business "was in no sense changed by or after the nominal reorganisation," the same office, books, and equipment were kept, the employees were the same, the same property, methods, and appliances were used, the same accounts were kept, the same reports were made to the Standard Oil Co. and the same instructions were received from it and the same control exercised as before, and "the old contract and understanding and agreement *about the division of territory* was maintained and respected and enforced" (*id.* p. 25);

That contemporaneously with this reputed reorganisation H. C. Pierce filed an affidavit with the secretary of state of Texas that the Waters-Pierce Oil Co. incorporated under the laws of Missouri on the 29th May 1900 had not entered into any such combination or conspiracy as therein mentioned [the affidavit fills more than a page of the record and is there set out at p. 26–27], and the secretary of state granted the permit dated May 31st 1900, and all the representations made by H. C.

Pierce in the affidavit were false and fraudulent (*id.* p. 26–28, VI);

[*Note.*—The defendant excepted to these allegations regarding the affidavit on the ground that they were immaterial (*id.* p. 46, 47, 71, 75, exc. 4, 5, 67, 81), and the exceptions, among others, were overruled (*id.* p. 97), but at the trial the affidavit was excluded (*id.* p. 518).]

That by the machinery before described "the conspirators herein named" have taken over and acquired a large number of companies and businesses [some of which are named] for the purpose of destroying competition, and especially competition with the Waters-Pierce Oil Co. [there is nothing to indicate whether the *old* or the *new* company is intended], which was a party to the acquisition and arrangement (*id.* p. 28, VII);

That an organisation is maintained at 26 Broadway, New York (*id.* p. 28, VIII), constituting a committee, of which H. M. Tilford was a member (*id.* p. 31), who have brought under their control a large number of corporations, including the defendant, engaged in buying and selling oil and other products of petroleum, who but for this control would be competing companies in Texas, and by this control all competition between them, especially in Texas, is destroyed, and certain sections of the United States are assigned to them for business, and the Waters-Pierce Oil Co. is permitted to do business in Texas, and with its consent and upon its demand all other companies under this control are excluded from Texas, and by reason of the control these companies, including the defendant, are required to secure the oil used and sold by them from such refineries and at such prices as are determined by the organisation, whereby a monopoly is accomplished and the price is affected and increased (*id.* p. 29);

That since the reputed reorganisation of the Waters-Pierce Oil Co. of May 29th 1900, that company has continuously violated the laws of Texas in these particulars: [there is no particular (1) in the petition] (2) the Standard Oil Co., through the several corporations it has acquired, controls substantially all the oil business of the United States, including Texas, which are parcelled out at its pleasure to the several corporations under

its control and all competition between them is destroyed; (3) the Standard Oil Co. has exercised control of the Waters-Pierce Oil Co. at all times, except when prudential or political reasons rendered it advisable for H. C. Pierce to control, and this was done with the sanction of the defendant; (4) in carrying out the unlawful agreements H. C. Pierce and the managers of the Standard Oil Co. have frequently come in conflict, but in all things relating to the monopolisation of the oil business and destroying competition, all have acted in harmony, and H. C. Pierce has never taken any step to protect the defendant from the control of the other company, but acquiesced in the acquisition of that control; (5) the division of territory previously mentioned has been insisted on by the defendant and acquiesced in by the Standard Oil Co. and the price of oil has thereby been maintained; (6) the Standard Oil Co. placed on the pay-roll of the defendant R. H. McNall, as commercial agent, and named his place of business as 75 New Street, which is the back door of 26 Broadway, and he had been and continued to be a clerk under control of H. M. Tilford, one of the organisation there, and he received there the reports required of the defendant by the Standard Oil Co.and signed and forwarded the letters of instructions to the defendant prepared by the officers of the Standard Oil Co., and this was done to render more difficult the discovery of the falsity of the affidavit of H. C. Pierce and to hide the unlawful character of the business; (7) the Standard Oil Co. has continuously since May 31st 1900 with the acquiescence of the defendant sent auditors to the officers of the defendant and checked up its books and accounts and made reports of the details of its business to the Standard Oil Co.; (8) by the control of the 2750 shares in the Waters-Pierce Oil Co. fraudulently and fictitiously held in the name of H. C. Pierce and M. M. Van Beuren, the Standard Oil Co. has controlled the defendant with its acquiescence; (9) since May 28th 1900, as before, the agreement theretofore entered into by the old Waters-Pierce Co., that it should not buy oil or other products of petroleum except from the Standard Oil Co. or corporations designated by it, has been *carried out and acted upon* by those companies in Texas (*id.* p. 30–32);

That the Standard Oil Co. owns and controls the Corsicana

Refinery and the Security Oil Co., which are refiners in Texas of crude petroleum, and under the terms of the agreement they have not sold their products to any company operating in that state other than the defendant (*id.* p. 32);

That under the terms of the agreement the price at which the defendant buys oil is fixed by the Standard Oil Co. (*id.* p. 32–33);

That the defendant since May 31st 1900 has *observed* an agreement or understanding with the Standard Oil Co. that it would not sell any oil to ships in any port of Texas on its own account (*id.* p. 33);

That the defendant continuously since May 31st 1900, for the purpose of securing a monopoly in Texas, has maintained at a number of points concerns in apparent opposition to it, has made *exclusive contracts* with merchants preventing them from handling the products of other companies, has cut prices below cost until competition was destroyed and then recouped by extraordinary increase of prices, has given rebates, gratuities, and bribes, has maintained a system of spies, has corrupted the employees of railroads and other concerns (*id.* p. 33);

[*Note.*—No evidence was adduced of any such *exclusive contracts*, and no issue regarding them was submitted to the jury.]

That "the Waters-Pierce Oil Co. hereinbefore referred to" bought out competing businesses in Texas and maintained at a number of points oil selling concerns apparently in opposition to it, in this, to wit (*id.* p. 33); it [the *old* Waters-Pierce Co.] entered into certain exclusive contracts (dated Sept. and Oct. 1894, and set out, *id.* p. 39–43) with the Eagle Refining Co. and A. W. Clem and others, and in 1896 bought out the business of the Texas Oil & Gasoline Co. and Roy Campbell, and entered into contracts with them for conducting their business as a competing concern, and the defendant assumed and carried out the contracts (*id.* p. 33–34);

[*Note.*—The judge at the trial charged the jury that the evidence did not show that the defendant had acted under these contracts and that they should find for the defendant on the issues relating to them (*id.* p. 291–292, XII).]

That the defendant, "in the conduct of *unfair competition*" and "in the further unfair destruction of competition," has given rebates secretly and unfairly and secretly reduced prices at certain points "to less than schedule price" on account of competition, and used "secret and questionable means" in obtaining information concerning the business of competitors, some details of which are set out (*id.* p. 34–36);

That by these means the price of oil has been maintained at an exorbitant figure, competition has been suppressed and business destroyed in the state, and a substantially complete monopoly in petroleum products has been established (*id.* p. 36);

That the defendant was granted a permit to transact business in Texas, as before alleged, and in granting it the State conferred upon the defendant the right to exercise there only such powers as are granted by law to such corporations; that the defendant in pursuance of its business established stations and officers throughout the state, and in abuse of its powers maintained "a war of extermination of all competitors" within the state and has by a system of unfair competition and by devices before set forth destroyed the business of its competitors (*id.* p. 36–37);

And the State claimed judgment for penalties of $5000 a day under the act of 1899 from the 31st May 1900 to the 31st March 1903 and $50 a day under the act of 1903 from the 31st March 1903, to the time of filing the amended petition, and cancellation of the defendant's permit, and an injunction against doing any business other than interstate business within the state (*id.* p. 38–39).

The defendant by its answer (*id.* p. 43) set up several matters in abatement (*id.* p. 43–45), and then alleged various exceptions (*id.* p. 45–77) to the petition, which were overruled (*id.* p. 97), and among them the following, upon which error was assigned in the court below (*id.* p. 353–358) and in this Court,

9. To the parts of the petition claiming penalties and cancellation of the permit under the act of 1903 on account of the *owner-*

ship by the Standard Oil Co., of a majority of the stock of the defendant, because the same was so *owned long before the passage of the act*, and the act, if given the effect of making it an offence on the part of the defendant for such holding to continue, was ex post facto in its operation and would deprive the defendant of its property without due process of law contrary to the Constitution of the United States (*id.* p. 49; assnt. errors, par. 4, *id.* p. 1190, *post* p. 58);

10. To the parts claiming penalties and forfeiture of the permit because of the alleged *agreement or understanding* that, in consideration of the defendant purchasing all its supplies from the Standard Oil Co., the defendant should be permitted to sell its products in Texas without competition by that company, because it appeared that the Standard Oil Co. had never entered Texas to do business there, and the agreement could not violate the laws of Texas without giving them an extra-territorial effect and with respect to *interstate commerce* and in violation of the said Constitution (*id.* p. 49–50; assnt. errors, par. 22, *id.* p. 1204, *post* p. 74);

20. If the petition was construed as alleging that the defendant is the same corporation as the old Waters-Pierce Co. (as it did), then to the allegations claiming penalties under the act of 1899 on account of the ownership by the Standard Oil Co. of the stock of the defendant or on account of the alleged agreements, because it appeared that the *ownership* existed and the *agreements* were made *before the passage of the act*, and if the act authorised a recovery of penalties on account of the continuation of them, it would violate the said Constitution in being retroactive, and impairing the obligation of contracts, and denying to the defendant the equal protection of the laws, and taking its property without due process of law (*id.* p. 53; assnt. errors, par. 5, *id.* p. 1190, *post* p. 59);

21. To the allegations claiming penalties under the act of 1903 on account of such *ownership* of stock or the alleged *agreements*, upon the like grounds as are mentioned in 20 (*id.* p. 53–54; assnt. errors, par. 6, *id.* p. 1192, *post* p. 60);

25, which objected that each of the acts of 1899 and 1903 was so *indefinite, vague, and uncertain* that it could not be ascertained from its language what acts fall within the prohibitions

and constitute an offence subjecting the offender to punishment, and therefore to subject the defendant to penalties and forfeiture of its permit would be taking its property without due process of law and denying to it the equal protection of the laws contrary to the said Constitution (*id.* p. 55–56; assnt. errors, par. 7, *id.* p. 1193, *post* p. 61);

52 and 53, which objected as to each of the acts of 1899 and 1903 respectively, that by reason of its being so *indefinitely framed* and of such doubtful construction that it cannot be understood and by reason of its failure to designate an offence by the plain import of its words, the infliction of the penalties prescribed would be the taking of property without due process of law contrary to the said Constitution (*id.* p. 68; assnt. errors, par. 8, *id.* p. 1193, *post* p. 62);

28 and 38, which objected that the recovery of penalties for acts done more than two years before the action was barred by art. 219 of the Code of Criminal Procedure (*id.* p. 56, 60); 30, 31, 40, and 41, which objected that, if that limitation was not available, the defendant would be denied the equal protection of the laws contrary to the said Constitution and the statutes of 1899 and 1903 would therefore be invalid respectively (*id.* p. 57, 60); 32 and 42, which objected that the recovery of penalties for acts done more than two years before the action was barred by art. 3354 of the Texas Revised Statutes (*id.* p. 58, 61); 34 and 44, which objected that if this limitation was not available, the defendant was denied the equal protection of the laws contrary to the said Constitution and the statutes of 1899 and 1903 were therefore invalid respectively (*id.* p. 58, 61); 35 and 37, which objected that the recovery of penalties under the statute of 1899 was done more than four years before the action was barred by art. 3358 of the same Revised Statutes, and, if this limitation was not available, the defendant was denied the equal protection of the laws contrary to the said Constitution (*id.* p. 59) (assnt. errors, par. 21, *id.* p. 1203, *post* p. 74).

The answer then denied all and singular the allegations in the petition and alleged that the defendant was not guilty of any of the acts or wrongdoings therein charged against it (*id.* p. 78).

The answer then proceeded to set up specially among others the following matters, viz., 1–21, the statutes of limitations, making the like claims as have been already mentioned in the exceptions (*id.* p. 78–84);

24. That, if the defendant ever entered into and became a party to any *agreement*, combination, *or understanding* with any other corporation, individuals, and persons or was a party to a union and combination of capital between persons and corporations for any of the purposes denounced as illegal by the act of 1899, or became a party to a combination of capital, and entered into a combination and united its interests with other corporations and persons for any of the purposes denounced as illegal by the act of 1903, all of which was denied, the same were made *outside of the state of Texas* and with reference to commerce between states other than Texas, and, if the same affected commodities in Texas, it has been in respect to commerce therein between the state of Texas and some other state, and the acts of 1899 and 1903 had no application to them because the laws of Texas had no *extra-territorial operation*, and, if those acts had any such application, they would also violate the provisions of the said Constitution regarding interstate commerce (*id.* p. 86–87);

25. That the defendant was a corporation chartered in Missouri and it was not within the constitutional powers of Texas to make it an offence against its laws by reason of *ownership of stock* in that corporation by persons or corporations prohibited by the laws of Texas, and such construction of the said statutes would deprive the defendant of its property without due process of law and deny to it the equal protection of the laws contrary to the said Constitution (*id.* p. 87);

26. That the *ownership* of stock in the defendant corporation was subject to the exclusive jurisdiction of Missouri, and, if the Standard Oil Co. ever became the owner of such stock, the same was acquired under a *contract* valid *in Missouri* where it was made and where the stock had its situs, and it was not within the constitutional powers of Texas to make it an offence for the Standard Oil Co. so to own such stock, and, if either of the acts of 1899 and 1903 was held to give the right to penalties against this defendant on that account, such act would

impair the obligations of a contract, and deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, contrary to the said Constitution (*id.* p. 88);

27. That, if it is held that the Waters-Pierce Oil Co. chartered May 7th 1878 was not legally dissolved and that this defendant is in legal effect the same corporation and required to answer for the doings of that company, the said former company was also created under the laws of Missouri and the ownership of stock in the company by the Standard Oil Co. as alleged in the petition was based upon the acquisition of such stock by that company upon contracts antedating the acts of 1899 and 1903, which contracts were valid when made and where the stock had its situs, and the said statutes, so far as they can be held as making the defendant liable to penalties for that reason, violate the provisions of the said Constitution referred to in par. 26 and also the provision forbidding any state to pass *ex post facto* laws (*id.* p. 88);

28. That the act of 1903, if applicable to any holding of such stock by the Standard Oil Co. on March 31st 1903, or continued after that date, was unconstitutional, because, if such stock was so held, it was under contracts made prior thereto which were valid when made, and to attempt to hold the defendant liable to penalties on account of such holding would deprive the defendant of its property without due process of law, and deny to it the equal protection of the laws, and would impair the obligations of the contract under which the stock was acquired and held, and would render the defendant liable because of something occurring prior to the passage of the act, contrary to the said Constitution (*id.* p. 89);

29. That the act of 1899 was unconstitutional, because of its terms and in the construction of its language as applied to the facts alleged in the petition it was so vague, indefinite, and uncertain of meaning that it was impossible for the defendant in advance of its construction and application to any state of facts by the verdict of a jury and the ruling of the court, to understand its meaning and legal effect, or to know what was lawful and permissible and what was unlawful, and that the same would, if the defendant was convicted, deprive the defen-

dant of its property without due process of law and deny to it the equal protection of the laws contrary to the said Constitution (*id.* p. 89);

32. That the act of 1903 was unconstitutional for the like reasons (*id.* p. 90–91);

35. That the enforcement of the acts of 1899 and 1903 respectively against the defendant by making the penalty for the violation thereof cumulative with a separate penalty for every violation on every day would be confiscatory and would result in the infliction of unusual and excessive punishment for the violation of statutes of doubtful meaning, the validity, import, and scope of which could not be ascertained by the defendant without being subjected to the practical confiscation of its property while the meaning and scope was being judicially ascertained, and that to subject the defendant to penalties as claimed would result in the infliction upon it of unusual and excessive fines and penalties contrary to the Texas constitution, art. 1, s. 13, and deprive it of its property without due process of law and deny to it the equal protection of the laws contrary to the Constitution of the United States (*id.* p. 92);

36. That the State of Texas on the 31st May 1900 granted the defendant a permit to do business in that State for ten years from that date in consideration of $180 then paid, being the fees and franchise tax chargeable and then payable therefor, the only condition attached thereto being that the defendant should annually pay the annual franchise tax, which it has annually paid at the proper time, and that the State of Texas thereby entered into a valid contract with the defendant entitling the defendant to conduct its business within the State for the ten years, and that the act of 1903 was passed after the making of that contract and was unconstitutional in all respects wherein it undertook to restrict the ownership of stock in the defendant and to make the existence and performance of contracts theretofore legal a violation of its terms, and that it had no force as affording grounds for cancellation of the said contract, and that to allow the State to cancel the said permit upon any of the grounds alleged in the petition and arising under the act of 1903 would violate *the obligation of the said contract* contrary to the Constitution of the United States (*id.* p. 92–93).

A motion was made on behalf of the defendant for a change of venue, for the reason that there existed in Travis county where the case was pending, so great a prejudice against the defendant that it could not obtain a fair and impartial trial there (*id.* p. 97). This motion was refused (*id.* p. 103).

The evidence upon the hearing of this application is set out in a bill of exceptions (*id.* p. 113–283), and shows the state of feeling existing in Travis county about the case, which was made part of a violent political contest there regarding the election of a U. S. senator, and was the subject of vehement discussion in the newspapers. Letters written by the Attorney-General of the State about the case and its connection with the political contest and published in the newspapers in the autumn preceding the trial are set out in the bill of exceptions (*id.* p. 219–226, 232–236), with the newspaper comments upon them.

At the trial of the action, which began on the 21st May 1907 (*id.* p. 396), the plaintiff adduced evidence, which was admitted against the objection of the defendant, of the following matters, viz.,

The incorporation of the Standard Oil Co. under the laws of Ohio, January 10th 1870 and the subsequent increase of its capital (*id.* p. 396, 998) [No evidence was adduced of the *conspiracy* alleged (*id.* p. 2) to have been entered into about January 1st 1870];

The incorporation of the old Waters-Pierce Oil Co., May 1st 1878, and the increase of its capital to $400,000 on June 13th 1882 (*id.* p. 397–398, 1005–1009);

The Standard Oil Trust Agreement of January 2nd 1882, and the supplemental agreement of January 4th 1882 (*id.* p. 398–400, 7–16), with an agreement of counsel (*id.* p. 399) that the old Waters-Pierce Co. did not sign either of them, and that H. C. Pierce, who then owned 40 per cent. of the stock, did not sign

either of them or deposit any part of his stock under them, and that H. A. Hutchins and W. P. Thompson, who owned 40 per cent., and the Chess-Carley Co., who owned 20 per cent. of the stock, deposited their shares under the agreement, and that from the organisation of the trust the Standard Oil Trustees held substantially 60 per cent. of the stock under the agreements until 1892;

The incorporation of the Standard Oil Co. of New Jersey, August 1st 1882, and the increase of its capital and the change in its name by omitting therefrom the words "of New Jersey," and amendment of the objects of the company in 1892 and 1899 (*id.* p. 400–402, 1011);

The deposition of *Ida M. Butts*, of Marietta, Ohio (*id.* p. 403–424), who testified to the proceedings by the Attorney-General of Ohio in the state courts to force the Standard Oil Co. of that state out of the Standard Oil Trust or cause it to cease doing business in the state, in which the decision was in favor of the State (*id.* p. 405), and the subsequent transactions by which the property held by the trustees was transferred to the Standard Oil Co. (of N. J.) (*id.* p. 422);

The incorporation of the following companies, viz.,

Standard Oil Co. (of Kentucky) November 1, 1886 (*id.* p. 426, 1031),

Standard Oil Co. (of Pennsylvania) August 15, 1868 (*id.* p. 427, 1042),

Standard Oil Co. (of Indiana) June 11, 1889 (*id.* 427, 1045–1046),

Standard Oil Co. (of Iowa) June 10, 1885 (*id.* p. 428, 1037),

Standard Oil Co. (of N. Y.) August 10, 1882 (*id.* p. 428, 1057),

Atlantic Refining Co. (of Pennsylvania) April 29, 1870 (*id.* p. 429, 1078).

An agreement of the parties, subject to all legal objections, (1) that the Standard Oil Co. of N. J. was a corporation organised under the laws of New Jersey, and since its organisation in 1882 had not conducted any business in Texas or had a permit to do business there; (2) that this Standard Oil Co. owned in the *old* Waters-Pierce Co. 2747 out of the total of 4000 shares, and since about the 24th September 1900 has owned 2748 out

of the total of 4000 shares of the *new* Waters-Pierce Oil Co.; (3–8) that the same Standard Oil Co. owns a majority of the shares in the Standard Oil Co. of *Indiana*, the Standard Oil Co. of *New York*, the Standard Oil Co. of *Kentucky*, the Continental Oil Co. (of Iowa), the Republic Oil Co. (of N. Y.) and that these companies had never transacted any business in Texas or had a permit to do so (*id.* p. 424–426, Stipulation No. 1);

(The defendant did not object to the admission of the 1st of the matters in this agreement (*id.* p. 424);

[It was not suggested that H. C. Pierce, or the defendant, was concerned in the formation of any of these companies or had any interest in them.]

The judgment of the District Court of the 15th June 1897 revoking the permit of the old Waters-Pierce Co. to do business in Texas (*id.* p. 439, 1083);

The mandate of this Court, reciting that the said judgment was affirmed by the Court of Civil Appeals on the 9th March, 1898, and that the judgment of that court was affirmed by this Court on the 19th March 1900 (*id.* p. 439, 1088) [*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28];

The affidavit of the dissolution of the old Waters-Pierce Co. on the 28th May 1900, a copy of which was filed with the Secretary of State of Texas (*id.* p. 439, 1083);

Also, without any objection on the part of the defendant,

The articles of association and certificate of incorporation on the 29th May 1900 of the defendant the Waters-Pierce Oil Co. (*id.* p. 439, 1085–1087);

The permit to do business in Texas issued to the present Waters-Pierce Oil Co. on the 31st May 1900 (*id.* p. 439, 1088);

The plaintiff also put in evidence portions of a deposition of *H. C. Pierce* (*id.* p. 440–511), taken at St. Louis on the 19th March 1906 and subsequent days down to the 10th September 1906 in a case of the State of Missouri against the Standard Oil Co., the Waters-Pierce Oil Co., and the Republic Oil Co. (which it was agreed might be used as if taken in this case), and in which he testified,

That the number of shares in the present Waters-Pierce Oil

Co. standing in the name of M. M. Van Beuren, and being the property of the Standard Oil Co., was substantially 2746, and H. C. Pierce himself owned 1250 (*id.* p. 441);

In 1877–1878 he organised under the laws of Missouri the first Waters-Pierce Oil Co., which succeeded to the business of Waters, Pierce, & Co. The original capital was $100,000, of which Waters, Pierce, & Co. subscribed 40 per cent., H. A. Hutchins and W. P. Thompson 40 per cent., and Chess, Carley, & Co. 20 per cent. Some time afterwards Hutchins and Thompson and Chess, Carley, & Co. transferred their 40 and 20 per cent. to the Standard Oil Trust, and H. C. Pierce purchased the interest of W. H. Waters (in 1890, *id.* p. 446), and when on May 29th, 1900, the first Waters-Pierce Oil Co. was liquidated, the assets were distributed in these proportions (p. 441, 497);

When the Standard Oil Trust was organised, he was urged to place the company in the trust, but refused to do so, and, even after the other 40 and 20 per cent. had been placed in the trust, he still refused to place his stock in the trust (*id.* p. 497);

When the licence of the first Waters-Pierce Oil Co. to do business in Texas was revoked, he was told that the people of that state would not tolerate the methods of the Standard Oil Co. and that no corporation controlled by that company would be permitted to carry on business there. He explained this to the executive committee of that company and they agreed that he should organise a new company, the stock of which he should hold, and that he should manage and control the company absolutely free from any dictation or direction of the Standard Oil Co. (*id.* p. 441–442, 507–508). This was done, and in order that the company should transact its business in strict accordance with the laws of every state, he placed the attorney of the company on the executive committee (and he continued to be one of the directors till 1904, *id.* p. 447) with instructions to examine all reports and transactions so that no law should be violated (p. 498);

Up to the spring of 1904 the Standard Oil Co. made no attempt to interfere with his control, but at that time they transferred the stock that had stood in his name to M. M. Van Beuren and began in other ways to assume a control over the affairs and operations of the company. He protested against this conduct

as a violation of the agreement with him and as contrary to the representations he had made to the people of Texas. After frequent discussions, the management was again committed to his direction, and his son C. A. Pierce was now president of the company and conducting it as an independent business (*id.* p. 442, 498–499);

In 1878, when he organised the first Waters-Pierce Oil Co., its predecessors Waters, Pierce, & Co. and H. C. Pierce & Co. had already established business in all the territory in which the present Waters-Pierce Oil Co. now operates, and it was agreed between him and the Standard Oil Co. of Ohio (then the only one in existence) that the first Waters-Pierce Oil Co. would confine its operations within the territory in which Waters, Pierce, & Co. and H. C. Pierce & Co. had transacted their business. In pursuance of this understanding certain lines were agreed upon in Illinois (*id.* p. 442);

The line in Missouri commenced just south of Hannibal and ran according to county lines south-west to the western border of Missouri, bordering upon Kansas a short distance south of Fort Scott, and included Arkansas, the Indian territory and Oklahoma, Texas, Louisiana west of the Mississippi, and Mexico. There has been no change in that territory, and the Waters-Pierce Oil Co. confined its operations to building up the trade within it (*id.* p. 443);

The old Waters-Pierce Co. organised in 1878 succeeded the partnership of Waters, Pierce, & Co., which had succeeded the firm of H. C. Pierce & Co. (*id.* p. 443). His business in this territory extended over 37 years (p. 445), going back to 1869 (p. 502), and commencing with W. H. Cobb & Co. (p. 500);

The old Waters-Pierce Co. at the time of its organisation obtained its supplies of refined oils from the Standard Oil Co. and has done so since, and neither the old nor the present company refined any oil or manufactured products of petroleum in the United States, but did manufacture lubricating oils and greases. It established refineries in Mexico and got the crude petroleum for refining from the Standard Oil Co., as crude petroleum was not produced in Mexico (*id.* p. 444, 476–477);

The first refineries from which the old Waters-Pierce Co. received its oil were all at Cleveland, *Ohio*. Afterwards, when

oil was discovered in *West Virginia*, then certain supplies came from Parkersburg, W. Va. Later, when crude oil was discovered in *Ohio* and *Indiana* and a refinery was established at Whiting, at a less distance, a large percentage came from Whiting, Ind. Those three points were the sources from which the Waters-Pierce Oil Co. received its supplies up to the last three or four years. They now come from Kansas, Texas, and other points (p. 476–477).

The present Waters-Pierce Oil Co. in 1900 succeeded to an established business of the old company and has since confined itself to building up the business within the territory formerly occupied by the old company. The gross sales amounted in 1902 to 2,677,362 barrels of 50 gallons each (*id.* p. 445, 506);

During this time there was no source, other than the Standard Oil Co., from which a sufficient quantity of merchandise could be obtained to supply the market demand in that territory (*id.* p. 499, 509). The Waters-Pierce Oil Co. has never owned or been interested in any oil wells or oil-producing property in the United States (p. 499, 504);

The firms which preceded the old Waters-Pierce Co. purchased crude oil and petroleum from parties other than the Standard Oil Co., which did not then have an existence, and refined such crude oils at their refineries in St. Louis and sold the oil where it could. When the firm of W. H. Cobb & Co. was organised in 1869, succeeding J. R. Finlay & Co., it for a time continued the same method, but, when the Standard Oil Co. came into existence, the firm commenced purchasing crude petroleum and its refined products from that company and also continued purchasing from others, and this continued until the organisation of the old Waters-Pierce Co. in 1878. Since 1878 the Waters-Pierce Oil Co. has acted within its United States territory, almost solely as merchandisers of the Standard Oil Co., and in Mexico has purchased crude oil from that company and manufactured and sold it there (*id.* p. 449);

Since 1878 no attempt had been made to sell oil or transact business outside of the territory in which the present Waters-Pierce Oil Co. now operates (*id.* p. 448). He, as manager, did not deem it expedient to do business beyond the territory wherein the company was thoroughly and fully equipped. He did not

deem it expedient, from the standpoint of to-day, to extend to other points in Missouri, because the company was not equipped to do business at Kansas City, and it had not been equipped because the original Waters-Pierce Co. had agreed to confine its operations to the territory in which it and its predecessors have transacted business. That was the initial reason, but the main reason was the one first mentioned. As to the Standard Oil Co. he did not know the reasons of its operations (*id.* p. 450);

The present company succeeded by purchase to the plant of the old company and has confined itself to building up its business in that territory with the plant it so acquired. Since that time there has never been any understanding or discussion with respect to the division of territory (*id.* p. 506);

The present company never had any understanding or agreement with any other company or person for the purpose of fixing or intending to fix or maintain the price of any of the products of petroleum (*id.* p. 500, 507);

His share in the old Waters-Pierce Co. was practically 40 per cent. and the assets were divided upon that basis. On the reorganisation of the company on May 29th 1900, he owned 100 per cent. of the stock, for which he subscribed and paid, and he received the certificates in his name and held them for several months [till September 4th, 1900, *id.* p. 458, 460], when he endorsed in blank and delivered the certificates for 68½ per cent. of the stock (*id.* p. 451, 453). The transfer was made in accordance with an understanding at the time of the organisation of the company (*id.* p. 452) that they should be transferred to the Standard Oil Co. (*id.* p. 460). At the time when he handed over the certificates, he received a cheque for the par value, $274,800 (*id.* p. 489). The stock continued to stand in his name till June or July, 1904, when it was transferred into the name of M. M. Van Beuren (*id.* p. 442, 452–453, 455). Meanwhile the stock continued to stand in the name of H. C. Pierce for the purpose of enabling him absolutely to control the company according to the agreement (*id.* p. 461–462);

After the transfer to Van Beuren in 1904 the Standard Oil Co. began to assume a control by ousting directors H. C. Pierce had elected and sending men there [to St. Louis] to manage the

company and into the territory of the company (*id.* p. 463). Mr. Tinsley came in April, 1904 (p. 483), and openly assumed charge in the fall of 1904, and afterwards made improper changes, against which H. C. Pierce protested in May and June 1905 (p. 485–487), and about this time Mr. Tinsley was removed (p. 483, 485);

The old Waters-Pierce Co. had made reports to the various heads of departments of the Standard Oil Co. of whatever was desired regarding its business, and, after the new company was organised in 1900, the business had increased so much, that R. H. McNall was appointed Commercial Agent of the new company, who was to have his office at 26 Broadway, N. Y., the home of the Standard Oil Co., and through whom communications between the two companies should pass (*id.* p. 466–467). The right of the Standard Oil Co. as the majority stockholder to have such information as it desired was recognised, and H. C. Pierce instructed the heads of departments of the Waters-Pierce Oil Co. to send such information as was asked for (*id.* p. 471). The Standard Oil Co. audited the books as often as it saw fit (*id.* p. 464). Daily cash statements were always sent (p 482);

The dividends of the new company have been from 600 to 700 per cent. (*id.* p. 472). The new company does about 80 or 85 per cent. of the business in the territory where it does business (p. 478); the percentage is less than it was formerly, owing to the discovery of crude oil in Texas, Louisiana, Kansas, and the Indian Territory and Oklahoma (p. 479), which has caused the starting up of a great number of small refineries (p. 479, 510).

He attributed the large percentage of business to the better facilities that the company could furnish to the consumer (*id.* p. 505, 511). He described the manner of equipping it (*id.* p. 501–502). He valued the equipment and plants at about $5,000,000 (*id.* p. 503) and the tangible assets apart from the good-will at about $12,000,000 (*id.* p. 507) and the whole of the assets and good-will from $45,000,000 to $55,000,000 (*id.* p. 506).

He had never owned any interest in the Standard Oil Trust or been a shareholder in the Standard Oil Co. or any oil company other than the Waters-Pierce Oil Co. (*id.* p. 496).

It was agreed by counsel (*id.* p. 532) that a letter dated July 7th 1899 and five letters dated from February 8th 1901 to November 10th 1903 were written at the instance of the Standard Oil Co. by their general auditor Wade Hampton to the president or vice-president of the old and present Waters-Pierce Oil Companies respectively for the purpose of getting such information as would be revealed by an audit of the books and accounts of the latter. Each of these letters introduced a person going to St. Louis to audit the books, and each letter, except the first, requested that he be placed on the pay-roll as an employee of the Waters-Pierce Oil Co. (p. 533–536).

Wade Hampton, whose deposition was taken and put in evidence by the State (*id.* p. 512, 532), testified that he had been the general auditor of the Standard Oil Co. for over eleven years and his office was at 26 Broadway, N.Y., room 800 (*id.* p. 514), that the books of the present Waters-Pierce Oil Co. had not been audited by him or under his direction (p. 517), but prior to May 29th 1900 the books of the old Waters-Pierce Co. were audited by him or under his direction (p. 518) and the reports of the audit were submitted to him in person (p. 519). After that date the books were not audited under his direction, but by auditors of his employed by the Waters-Pierce Oil Co. direct (p. 520). He sent the persons mentioned in the letters to be employed by the Waters-Pierce Oil Co. to audit their books, and they were to be paid by that company because they were performing work for it (p. 521).

(These answers were offered on the special ground that they were *in conflict* with the admission in the agreement above-mentioned regarding the letters and therefore showed an effort of the witness to conceal the facts when his deposition was taken, and that he was *charged* as "one of the conspirators" (p. 512–513). The use of the testimony for this purpose was objected to by the defendant on the grounds that the witness was not an agent of the defendant, and the general allegation (*id.* p. 3) that he was one of the conspirators did not make the testimony pertinent to such an inquiry (p. 512), and that there was no conflict between the testimony and the admission, and that it was of no importance whether the auditors were

sent by the Standard Oil Co. or the defendant (p. 530–531). The judge overruled the objection and left it to the jury to say whether there was any conflict between the testimony and the agreement.)

[There was *no evidence* of *the conspiracy* charged or of anything that would have made the defendant responsible for any acts of the witness.]

The depositions of the following witnesses for the State were put in evidence, the defendant objecting that the matters testified to were irrelevant, viz.,

E. M. Wilhoit, who had lived 3½ years at Springfield, Mo., and before that at Joplin [time not stated], and 4 years at Topeka as agent of the Standard Oil Co. before coming to Joplin, and *prior to* this employment at Topeka was employed by the Consolidated Tank Line Co. at Wichita, Kansas (*id.* p. 430), which was absorbed by the Standard Oil Co. while he was there; while he was at Wichita, orders received from the Indian territory were filled in the name of the Waters-Pierce Co., which did business there and were charged to that company (p. 431). Some orders from the Panhandle country in Texas were filled by him, but he was told that it had been discovered by the Waters-Pierce Co. and he could not make further shipments (p. 432). He had never known them to market oil in the same territory or come in competition in any other place (p. 433).

C. F. Hatfield, who had employments with the Waters-Pierce Co. from 1889 to 1904, the first six months in Texas and afterwards at St. Louis, testified that before he was so employed he was private secretary to W. P. Thompson, in Standard Oil Block, 26 Broadway, N. Y., and by handling the correspondence of Mr. Thompson he had a general knowledge regarding the territory of the Waters-Pierce Co. and Mr. Thompson adjusted a dispute by having a map made showing the dividing lines in Missouri (*id.* p. 434–435). While he was in Texas there was a dispute about the exact dividing line in southern Louisiana which was adjusted (p. 436). The Waters-Pierce Co. had a general knowledge of the movements of competitors, and the data were systematically compiled (p. 435–436).

M. Mazon (*id.* p. 536), manager for the Consolidated Tank Line Co. at Decatur, Illinois, from 1887 to 1892, when its business was taken over by the Standard Oil Co. (Ky.) and afterwards manager or special agent there of that company till 1902 or 1904, testified that, after 1895 his territory came in contact with that of the Waters-Pierce Co. in Illinois and he was not allowed to sell oil beyond the line in Missouri or Illinois, all orders being referred to the Waters-Pierce Co. (p. 538–539).

G. J. Steigerwald (*id.* p. 539), clerk for a firm in the oil business at Cleveland, Ohio, from 1891 to 1901, and treasurer of the Scio Refining Co. about five months, and traffic manager of the Republic Oil Co. at Cleveland from June 1901 to April 1904, testified that the Republic Oil Co. was formed in 1901 and took over the business of the Scio Refining Co. (p. 541–542), which was the principal competitor of the Standard Oil Co. and the Waters-Pierce Oil Co. in the middle west but did not do much business in Texas (p. 542), and after the lapse of a year or more there came an apparent change in the method of doing business, particularly where sales would affect the business of those two companies, and salesmen were not allowed to sell certain grades of oil in towns where the Standard Oil Co. had exclusive tank wagon distribution facilities (p. 543), and several smaller stations in the territory of the Standard Oil Co. and one at Springfield, Mo., in that of the Waters-Pierce Oil Co. were closed (p. 547). The president of the Republic Oil Co. had his office at 75 New Street, N.Y., which was the back or New Street entrance to the Standard Oil Building, 26 Broadway (p. 544).

A. H. Gardner (filed Nov. 1906, *id.* p. 548) testified that he was in the oil business and had lived at Kansas City, Mo., 14 years and prior to that time at Denver, Col., where he was "connected with" the Continental Oil Co. which sold oil in Colorado, New Mexico, Utah, Montana, Wyoming, and represented the Standard Oil Co. there, and did not sell in any territory where the Waters-Pierce Oil Co. sold oil (p. 548). At Kansas City, he was connected with the National Oil Co. (p. 550), and was in active competition with the Republic Oil Co. which sought to procure their business "by giving of *rebates*, they to do the dirty work

and the Standard to maintain prices," then the National went to the Standard's outside stations and made a similar reduction, and afterwards the matter would be arranged between them, and prices restored (p. 550–551). He had never come in competition with the Waters-Pierce Oil Co. and the Standard Oil Co. at the same place (p. 551).

E. P. Pratt (*id.* p. 551), manager of the Consolidated Tank Line Co. at Des Moines, Iowa, till about 1892 and then at Kansas City, Mo., until November 1896 (p. 551–553), testified that his territory consisted of part of Kansas and Missouri and his company did not do business in the territory of the Waters-Pierce Co. ("It was according to our instructions to confine our business to what was known as our territory") (p. 552). In 1896 his company was succeeded by the Standard Oil Co. of Ky., and afterwards by the Standard Oil Co. of Indiana, of each of which he was manager, and his territory was the same as before (p. 553). The Waters-Pierce Co. did not do any business in it, and if an order was received from a dealer in Waters-Pierce territory, the course was to send the order to the Waters-Pierce Co. at St. Louis or to make the shipment and report it to the head office at Cincinnati (p. 554). His company had a system of obtaining information of shipments received by competitors, by taking numbers of cars, and this information was transmitted to the general offices (p. 555).

[When the objection to the two last depositions was made on the grounds that they related to matters out of Texas and between other companies than the defendant, and to transactions with which the defendant was not connected, the judge asked "Are they the companies alleged to be *conspirators?*" and, on counsel for the plaintiff answering Yes, the objection was immediately overruled (*id.* p. 548, 551).]

A. V. Jockel (*id.* p. 556), a bookkeeper of the Standard Oil Co. June to December 1904, then transferred to Waters-Pierce Oil Co. at Oklahoma city till February 1905, testified that he saw in the office of the latter at St. Louis persons who had been connected with the business of the Standard Oil Co. at New York, and that he installed at Oklahoma the Standard Oil report forms

(p. 557). When he was transferred, he was told to forget that he had been with the Standard Oil Co. (p. 558). The Waters-Pierce Oil Co. obtained the oil sold at Oklahoma city from the Standard Oil Co. and Galena Oil Co. (p. 559).

H. E. Platt (*id.* p. 559), clerk for Union Tank Line at 26 Broadway, N.Y., in February 1902 or 1903 for four months, then for Standard Oil Co. for two years (p. 560–562), said that the Union Tank Line furnished some cars to the Waters-Pierce Oil Co. and received reports from it showing arrival, loaded or empty, and when shipped, and by what railroads, and, after he was transferred to the Standard Oil Co., he was in Mr. Tilford's office, and he knew R. H. McNall, who had a desk in the same room (p. 560) and received reports from the Waters-Pierce Oil Co. which were taken to the office of the comptroller of the Standard Oil Co. (p. 561). He had seen unsigned letters sent to McNall from various departments at 26 Broadway on stationery of the Waters-Pierce Oil Co. and McNall had signed them and forwarded them to that company (p. 564).

A. A. Smith, stenographer in offices of Standard Oil Co. at 26 Broadway, May 1903 to June 1905 (*id.* p. 564–565), testified that reports from the Waters-Pierce Oil Co. were received at the office, and letters to that company were dictated to him and written by him on that company's letter-heads which he got from R. H. McNall, and were sent to McNall to be signed (p. 566–568).

F. D. Carley testified that he was in the oil business from 1865 to about 1884 and was connected with the firm and then the corporation of Chess, Carley, & Co. of Louisville, Ky., and sold oil in Texas and discontinued that business and joined in forming the old Waters-Pierce Co. (*id.* p. 569). He owned shares in the old Waters-Pierce Co. which were bought by someone introduced to him in the building of the Standard Oil Co. (p. 571).

W. N. Davis was connected with the Interstate Oil Co. till 1897 and did business, among other places, in Missouri, where

he met the Waters-Pierce Co. and the Standard Oil Co. but never both in the same place (*id.* p. 572). Prior to that time he was manager for seven years at Kansas city of the Consolidated Tank Line Co. which to the best of his knowledge was the Standard Oil Co. (p. 573), and he never permitted his men to seek patronage in Waters-Pierce territory; he employed a man to visit railway platforms and take the names of consignees from barrels sent by competitors, and travelling men visited the consignees to secure their business, with instructions to make a cut in price if necessary (p. 574).

W. A. Morgan was connected with the Standard Oil Co. from December 1898 to October 1900, first a travelling salesman in Missouri and then local station agent at Sedalia, Mo., and while travelling salesman never came in competition with the Waters-Pierce Co. (*id.* p. 575), and once or twice was reprimanded for going into their territory (p. 576). He had been selling oil for about five years since his connection with the Standard Oil Co. ceased, and had not met any competition from the Waters-Pierce Oil Co. in the Standard Oil Co.'s territory (p. 577–578).

H. R. Knollenberg said he was travelling salesman for the Waters-Pierce Co. in Illinois and Missouri from 1893 to 1898 or 1899 (*id.* p. 578), and never met any competition in his territory from the Standard Oil Co., the only information he had as to division of territory was that he was told not to go beyond certain limits (p. 579). He was sometimes assigned to territory of the Standard Oil Co. in Illinois and then made his reports to that company (p. 580–581).

T. R. Hopkins testified that he was agent of the Waters-Pierce Oil Co. at places in Missouri 1887 to 1903, and remembered the controversy with the State of Texas, and he received a letter discharging him and another re-employing him, and no change was made in the course of business (*id.* p. 582). He had no competition with the Standard Oil Co., he had once sold outside of his territory and was told by the manager not to do so any more, for, if the Standard Oil Co. found it out, we would

have to make up the difference of price (p. 583). While he was at Pierce city, the price there was 1½ to 3 cents higher than at Carthage, Joplin, Webb city, and Springfield, because there was competition at those places and none in his territory (p. 584). Orders received from Standard Oil Co. territory were sent to the office of the Waters-Pierce Co. who sent them to the Standard Oil Co. (p. 585).

The State also put in evidence the deposition of *R. H. McNall* taken in New York on behalf of the State (*id.* p. 429, 585–646), who testified that he had been in the oil business at 26 Broadway for about 20 years (*id.* p. 585), and was assistant to H. M. Tilford from 1895 to 1900, and was employed from 1900 to 1906 by the Waters-Pierce Oil Co. as its Commercial Agent with a desk in Mr. Tilford's office (p. 586–587), and he explained the details of the business he did in that capacity (p. 589). The Waters-Pierce Oil Co. sometimes furnished oil to ships at ports in Texas at the request of the Standard Oil Co. and charged it and sent the bills to the Standard Oil Co., and in other cases, where the delivery was not previously ordered by the Standard Oil Co., the Waters-Pierce Oil Co. sold the oil to the ships and collected the money from the ship (p. 634, 644–646). He also told what states the Continental Oil Co. and the Standard Oil Co. of Iowa did business in while he was with H. M. Tilford in 1895 to 1900 (p. 429, 586).

The State put in evidence, against the objection of the defendant, the agreement of the 5th October 1894 between the Eagle Refining Co. and A. W. Clem and the *old* Waters-Pierce Co. (*id.* p. 646), set out in the petition (p. 39).

Also the depositions of the following witnesses,

S. K. Wheeler, assistant manager of the Waters-Pierce Oil Co. 1903 to 1905, did not know Roy Campbell then (*id.* p. 650), believed he was an employee of the company, but had nothing to do with his employment, and did not know A. W. Clem (p. 651). The prices of oil were affected partly by competition and partly by cost (p. 656). The best oil was called Eupion, the second grade Brilliant (p. 657).

C. A. Pierce, president of the Waters-Pierce Oil Co. since June 1905, previously assistant-treasurer from the formation of the company in 1900 (*id.* p. 658, 956). He was also a member of the executive committee while it continued till the fall of 1904, and was one of a sub-committee of three who fixed the selling prices in Texas (p. 659, 957, 961). While Mr. Tinsley was vice-president after the disbanding of the executive committee he did not know how prices were adjusted, and, after his resignation in June 1905 until the formation of the advisory committee, they were adjusted by the vice-president A. M. Finlay, the general manager C. P. Ackert, and himself, and since that time they were considered and voted on by the advisory committee, and determined by himself and the president (p. 957–958).

He knew nothing about the original agreement for division of territory testified to by his father H. C. Pierce or about the practical working of any such agreement, but he knew of course that they sold oil in such territory where they were equipped to handle it and there was other territory where they did not sell it (p. 660). No discussion of the subject as regards the state of Texas while he was a member of the executive committee or since; he described the portions of the United States where the company did business; he knew the Standard Oil Co. had contracts with steamship lines and that the Waters-Pierce Oil Co. furnished supplies to them when requested and charged it to the Standard Oil Co. (p. 661–662, 665, 668). He explained the course of supplying oil on account of the Standard Oil Co. to customers with which that company had contracts (663–664).

He testified that R. P. Tinsley was elected vice-president April 28th 1904 and resigned June 22nd 1905, and he came to St. Louis in April 1904 and left the last of April 1905 (*id.* p. 666). From the organisation of the company in 1900, except while Mr. Tinsley was at St. Louis, H. C. Pierce directed the general policy of the company (*id.* p. 667).

Andrew M. Finlay, president of the present Waters-Pierce Oil Co. from its organisation in 1900 to June 1905 (*id.* p. 669), testified that Mr. Tinsley came to St. Louis in April 1904 and left the last of May 1905. [It was agreed that the suit of the

State of Missouri v. *Waters-Pierce Oil Co.* was filed the 29th March 1905] (p. 669). He explained how oil was ordered by the company and from what places (p. 670–672). The prices for selling oil in Texas were passed on by the general manager's office and recommendations made to the executive committee; they were based on cost, freight, local conditions, and competition (p. 673–674). He did not know how McNall got the information he communicated to the company; H. C. Pierce told him to give McNall information that he asked for and to address correspondence to him as Commercial Agent in New York (p. 674–675), and he had seen McNall and discussed business with him at 26 Broadway, where he was in the same room with H. M. Tilford (p. 676–677).

He had met Royer Campbell who did a small business at San Antonio and was bought out and put on a salary by the old Waters-Pierce Co. in 1894 under a contract made by another A. M. Finlay (p. 679) and had been continued by the new company in its employ; he had known Clem at Dallas who was employed by the new company as agent of the Eagle Refining Co. until that company stopped business in 1904 (p. 680).

When the new company was formed the old Waters-Pierce Co. discharged its employees and they were at the same time re-employed by the new company; the territory in which the new company did business continued the same, it included the whole of Texas, there was a map with reference to Missouri in the Missouri division office, the company did not do business east of the Mississippi in Louisiana, there was no change by the new company (p. 681–682). McNall's address was changed from 26 Broadway to 75 New Street about 1904, and the change was made at McNall's request (p. 682).

The witness had been the manager of the old Waters-Pierce Co. in Texas from 1878 and at St. Louis from 1887, and gave an account of the increase of business in Texas (p. 964–966). The prices at which the new company sold oil were fixed by Ackert (general manager), himself, H. C. Pierce, and C. A. Pierce, and, while Tinsley was at St. Louis, by Ackert, Tinsley, and himself acting together, and the company was run as an independent concern (p. 967); Tinsley interfered in the management, insisting on things being done that the witness did not think for the

interest of the company, discharging tried employees and putting in new men, and made himself generally disagreeable (p. 968).

E. S. Horn, assistant manager, formerly clerk, in lubricating department of the Waters-Pierce Co. for 15 years (*id.* p. 870), identified a letter (p. 684) from McNall June 15, 1904 (p. 1090) relating to a change of price, and testified that prices of wax products were fixed by the manager or, in his absence, by himself (p. 871); he would adjust them in case of an advance or decline, and, if a competitor offered similar goods at a lower price, he would reduce the price to meet the conditions (p. 871, 840). He never had any understanding with any Standard Oil interest regarding the price at which wax or lubricating oil would be sold by the Waters-Pierce Oil Co. (p. 872). He assumed that he received McNall's letter of March 24th 1904 (p. 609) about the purchase and selling price of wax, but had no positive recollection (p. 870–871, 872, 842), and said that if there was a change in the (purchase) price, it would naturally change their selling prices (p. 872, 841). Lubricating oil had been delivered to the Central Coal & Coke Co. at Kennard, Texas, at the request of and at prices agreed upon with the Standard Oil Co. by which the price was paid; the transaction was a sale to the Standard Oil Co. the same as to anybody (p. 873, 841). The Standard Oil Co. did not fix the minimum selling price of any oils for the Waters-Pierce Oil Co.; the Standard Oil Co. sold at less prices than they in other parts of the country; he had not heard of the Standard Oil Co. selling in Texas in the last six or eight years; the Waters-Pierce Oil Co. furnished lubricating oil to practically all the large railroads of Texas upon contracts made with the home office (p. 843). The prime factors in fixing prices were cost, competition, and profit, and such profit was added to the cost as the trade would stand where there was no competition (p. 844).

S. Johnson, manager of the lubricating department of the Waters-Pierce Oil Co. soon after the organisation of the new company till the previous year and associated with H. C. Pierce from a time prior to 1878 (*id.* p. 686), testified that he was absent from St. Louis in March 1904 (p. 687), and any letter from McNall in his absence would be opened and acted on by his assistant

Mr. Horn (p. 688). The selling prices of lubricating oil were fixed by himself; the company manufactured certain grades, and bought certain grades of the Standard Oil Co.; the selling prices of those so bought were not fixed by S. H. Payne of the Standard Oil Co.; the minimum price would usually be the cost price, the Standard Oil Co. might sometimes suggest prices, which were adopted if they were agreeable to the ideas of the Waters-Pierce officials regarding the conditions and their ability to hold the trade at those prices, or whether it would be necessary to go below those prices to get the trade (p. 689–690). Cost, including freight, and competition were the two principal things considered in fixing prices; there never was any understanding or agreement between him and the Standard Oil Co. regarding the selling prices (p. 691); he acted upon their advice, if the conditions justified it, and if not, he used his own judgment (p. 692).

Royer Campbell, called by the State, testified in court that he came to San Antonio in 1893 and engaged in coal oil business there, (*id.* p. 694) under the name of the Texas Oil & Gasoline Co. and did a business of nearly 8,000 gallons in the month of September 1894 (p. 695); at first and until the spring of 1894 he bought his oil of the *old* Waters-Pierce Co. at 16 or 17 cents a gallon (p. 696–697). He then bought 16,000 gallons from the Independent Oil Co. in Pennsylvania, and the day it arrived the Waters-Pierce Co. dropped its price to 12 cents, then finally to 8 to 10 cents, and a vigorous competition continued till October 1894 [all this testimony was objected to by the defendant p. 696, 698, 699]; they established what they called the Consumers' Oil Co. and followed his wagons round town and solicited his business more vigorously than they did to get other business, and went so far as to solicit business at his own house and tried to sell oil to his wife; they sold at 10 cents to consumers, and at 8 to dealers, and the Consumers' Oil Co. sold at 12, but he never cut his prices below 14 cents to the consumer, and 12 or 11 to the dealer, whoever he could induce to buy (p. 697–699). Louis Fries was local agent of the Waters-Pierce Co. (p. 701) and was his personal friend; they were bitter business enemies during the week but on Sunday usually went

fishing or hunting together, and he advised Campbell to sell out to the Waters-Pierce Co., *Arthur* M. Finlay (manager at Galveston) did the same thing, and they told him the Consumers' Oil Co. would drive him out of business (p. 705–706). He sold out to the Waters-Pierce Co. in September 1894 (p. 707) and agreed to enter their employ at $90 a month and continue the Texas Oil & Gasoline Co.'s business as long as they thought necessary for their account and not to re-enter the oil or gasoline business without their consent, it being understood that within six months he should get a permanent position with the company at $125 a month (p. 709, 711).

When the new company was organised he received a notice that he was discharged and the old company had gone out of business, and the same day or the next mail a letter from the new company telling him that he would be continued in the employ of the new company at the same salary (p. 710). He continued the business from October 1894 under the name of the Texas Oil & Gasoline Co., making requisitions on the manager of the Waters-Pierce Co. at St. Louis for his supplies (p. 712) and receiving the oil in tanks of the International Oil Works or from Corsicana, but not in Waters-Pierce tanks (p. 713); the only change after the reorganisation in 1900 was that he put up a little sign on his stable or warehouse "Waters-Pierce Oil Co." (p. 714, 730); he had instructions to put it on the warehouse (p. 735), but he had the name of the Texas Oil & Gasoline Co. on his tank wagons and stationery (p. 714); he continued the business in that name till March 1904, when he quit and the business and property were turned over to the Waters-Pierce Oil Co. (p. 714, 724). The Consumers' Oil Co. did not continue long after he was bought out, about four months (p. 716).

The business of the Texas Oil & Gasoline Co. was conducted without change from 1894 to 1904; he made reports to the Waters-Pierce Co. at St. Louis and used blank envelopes without anything on them to indicate from whom they came (p .717) and he received no envelope from St. Louis with the Waters-Pierce Oil Co.'s name on it (p. 718). In order to meet competition, rebates were paid to hold the trade in some instances, which he thought continued till sometime in 1903, but all rebates

were cut out when he was discharged; Horan & Co. got rebates after 1900 (p. 719, 729). The course of business of the Texas Oil & Gasoline Co. while he ran it was, not to look after regular customers of the Waters-Pierce Co., but to look after the disgruntled trade, the anti-trust shouters (p. 719–720). He gathered information of what independent dealers were doing by spying on the railroads and noting every suspicious tank car that came to town, and furnished the information to Fries who compiled it (p. 720–722). (Objections to this testimony overruled, p. 721.)

The price of oil was put up to 22 cents in 1895 or 1896 and gasoline to 25, and just before he sold out oil was 8 cents; after he sold out, there was a gradual advance up to 20 or 22 cents for oil, and 22 or 24 for gasoline in 1896 (p. 722); afterwards it went down from competition or perhaps the inclination of the company to sell it cheap; he had no independent recollection about prices after 1900; the prices were regulated by instructions from St. Louis, and he offered suggestions, based on reduced sales or competition (p. 723–724).

The State put in evidence part of the deposition of *H. J. Cohn*, who was connected with the Waters-Pierce Co. for about 10 years in various positions from office-boy to salesman and was division-auditor and salesman at St. Louis from April 1900 to September 1902 under C. L. Ackert (*id.* p. 735). He described the territory in which the company did business; the Standard Oil Co. did not sell oil in that territory, and the Waters-Pierce Oil Co. did not sell oil outside of it (p. 735). He had been at Marshall, Texas, for about 8 years, and, while he was there, the [old] Waters-Pierce Co. received the greater part of its supplies from the Standard Oil Co. refinery at Whiting, Indiana, and a refinery at Corsicana, Texas, in addition to its railroad oil which came from the Galena Signal Oil Co. in Pennsylvania (p. 736).

Also a part of the deposition of *H. C. Arnold*, an accountant in the Standard Oil Co.'s building, 26 Broadway (*id.* p. 737), who testified that he had writen a letter to R. P. Tinsley at St. Louis, enclosing a charge for two blank books (p. 738–739).

A. W. Clem, a witness for the State, testified in court that he began oil business at Dallas, Texas, in 1890, in the name of the Eagle Refining Co., a corporation at Cleveland, Ohio (*id.* p. 740), did a business of about 40,000 barrels a month sent by the Eagle Refining Co. (p. 741); he remembered sending a carload to Seymour in 1891, which he sold at 16 cents delivered, and, when he went there to make delivery, most of his merchants refused to take the oil they had bought, unless he would meet the competition of the [old] Waters-Pierce Co. who were selling the oil to them at 5 cents a gallon, which they were previously charging 35 cents for (p. 742–743).

After they took over his business in 1894 [by the agreement C. p. 646, 39] there was no competition in his territory and the price of oil advanced gradually from 9½ cents to about 22 cents on the basis of Eupion in four or five months (p. 744) (all this testimony was objected to). He remained with the Waters-Pierce Co. 9 years, 1894 to 1904, running the Eagle Refining plant (p. 746). When he began business at Dallas in 1890, merchants were paying 23 cents for Eupion in bulk and 17 for Brilliant, and 37½ cents for Eupion in 2-5 cases and 24 for Brilliant, and he sold to some merchants at 17 cents in barrels; he sold about the same price at Lancaster (upon terms that he would not sell to any one else there, p. 769–770), and when the oil arrived, the [old] Waters-Pierce Co.'s agent made arrangements with the other merchants to sell at 10 cents a gallon (p. 748); the prices went all to pieces when he began selling oil (p. 749). (A letter of April 28, 1891 (p. 1117) from A. M. Finlay to a cashier at Dallas, as to making prices that would prevent Clem's doing any business, was put in evidence, against the objection of the defendant, p. 750).

He told of the contract of October 1894 [p. 39, C] with the old Waters-Pierce Co. (p. 749–751), after which the business of the Eagle Refining Co. was continued by the Waters-Pierce Co. till December 1903 in the name of the Eagle Refining Co. and he made reports to St. Louis (p. 751–753), in the manner described (p. 753–755), and the business was then given up (p. 755–756).

After the reorganisation of the Waters-Pierce Co. in 1900 there was no change in the manner of conducting the business of the

Eagle Refining Co. (p. 763); he received his oil from St. Louis in International Tank cars, not in Waters-Pierce cars (p. 764).

He testified about the relations of the Eagle Refining Co. and the old Waters-Pierce Co. in the suit against the latter in 1896, and there had since been no concealment of those relations, and the testimony had been published in the newspapers (p. 768–769).

His office from 1900 to 1903 was in the south part of Dallas, and he had a sign "A. W. Clem, Agent of the Waters-Pierce Oil Company," about 6 or 8 inches wide and 2½ or 3 feet long, which was first put on the back of his office, and somebody knocked it down, and then it was put up back of the warehouse; there was a railroad track back of the office (p. 779–781).

C. W. Cahoon, a witness for the State, testified in court that he was manager of the Central Texas division of the Waters-Pierce Oil Co. at Dallas since January 1903 and had been employed by the company 19 years (*id.* p. 781) and at Dallas since 1893; he kept record of their own sales and such information as agents and salesmen provided him with regarding others and reported daily to the St. Louis office (p. 782–783); agents were expected to keep him posted as to the business competitors were getting and their prices (p. 797–798). Corsicana had for the last two months been the principal source of supply in that division, previously it was Neodesha in Kansas; he did not know who the owner was; requisitions were placed with the St. Louis office; other sources were the Security Oil Co. and the Gulf Refining Co. (p. 783–784). He testified as to the extent to which oil was taken from the Corsicana Refining Co. (p. 787–793).

He estimated the percentage of the business done by the company since 1900 at about 80 per cent. (p. 796–797). They did not make a practice to meet competitors' prices, and depended on good service and high grade of goods to regain and hold the trade; occasionally they reduced prices to meet competition, but it was not frequent (p. 798); in a limited way they had given rebates or discounts to special merchants (p. 799).

He testified [against the defendant's objection, p. 799, 800] that at one time, Prime White or Standard White was marketed

as Eupion, because they could not get a supply of the other oil (p. 799–800, 832).

There was no material change in the manner of doing business after the reorganisation of 1900 (p. 800–801, 812–814). He testified [against the defendant's objection p. 807] as to the extent to which prices were changed to meet competition (p. 806–811), but it had not been the policy since 1900 to cut prices until it became a question of meeting a competitor's price or permanently losing the trade (p. 818). Also [against objection] he supposed the occasion for the re-incorporation of the company was the judgment excluding the old company from the state; he learned it from the newspapers (p. 835).

The deposition of *C. M. Adams* (*id.* p. 873, 844) was put in evidence by the State; he had been secretary or treasurer of the old and new Waters-Pierce Oil Cos. since 1878 and a director (p. 873–874); the selling prices of oil were fixed by the officers of the marketing department and there had never been any agreement or understanding with any Standard Oil interest about them that he knew about (p. 874–875). Reports to McNall were prepared in his office so that people interested in the company, the stockholders, would know its condition, assuming they were transmitted to the proper parties; they had no relation to the management or control of the business (p. 876–877).

He understood that up to June 1905 three of the directors of the new company represented the Standard Oil interests, except during the period while J. D. Johnson was a director (p. 844–847). [J. D. Johnson was a director from the organisation of the company in 1900 to the spring of 1904, when W. F. Taylor took his place, p. 447, 846.]

He knew nothing about any agreement or understanding, tacit or implied or express, that the Waters-Pierce Oil Co. should do business in Texas and none of the Standard Oil companies should do business there; they were doing business in the same territory that they had for years, where they had the tank-stations and appliances (p. 878–879).

He mentioned some of the changes made by Tinsley during the year he was at St. Louis (p. 879–884).

The deposition of *C. S. Keith*, vice-president and manager of the Central Coal & Coke Co. (*id.* p. 847–848), who testified that his company had contracts with the Waters-Pierce Oil Co. in 1903 and 1904, with the Bonner Oil Co. in 1905, with the Standard Oil Co. in 1906, and with the two last in 1907 (p. 849), and he produced contracts (p. 852–869), and a contract by the Standard Oil Co. with the Louisiana & Texas Lumber Co. (p. 849–850.) It might be that the Waters-Pierce Oil Co. was furnishing the oil under the contract with the Standard Oil Co. but all remittances were made direct to the Standard Oil Co. (p. 850).

C. P. Ackert, called by the State, testified in court that he was general manager since July 1903 and previously assistant general manager of the Waters-Pierce Oil Co. (*id.* p. 885) and had been connected with the Waters-Pierce Co. since 1884 and at St. Louis since 1893 (p. 886). He knew the territory in which the company did business and there had been no change since 1900 (p. 887–888). The Standard Oil Co. came into that territory in Louisiana in the previous year (1906) and he immediately put in more salesmen and reduced prices where necessary (p. 888–890). (A number of letters from R. H. McNall were put in evidence against the defendant's objection (p. 909–912; copies p. 1093–1117) relating generally to prices that the company would be charged or to information desired.)

He testified that the plant of the South-western Oil Co. which had been doing a competitive business at St. Louis was purchased about two years before (p. 913), after that company had gone out of business (p. 937). The International Oil Works belong to the Waters-Pierce Oil Co. as is generally known in the trade (p. 913–914, 937).

He said that the Waters-Pierce Oil Co. had about 450 stations in Texas (p. 928). The executive committee was organised in 1900 and continued till September 1904 and subsequently an advisory committee was organised in 1906 (p. 934). Selling prices were all passed on by the executive committee while it existed; the Standard Oil Co. had nothing to do with it; after the dissolution of the committee, the prices were fixed by A. M. Finlay, Tinsley, and himself, and C. A. Pierce (p. 935). Tinsley left St. Louis about June 1, 1905 (p. 936). The Stan-

dard Oil Co. on account of its large output really determines the market prices throughout the country, which apply to the Waters-Pierce Oil Co. as to everybody else, but the Waters-Pierce Oil Co. makes its own selling prices (p. 939, 948–949). It did about 80 per cent. of the business in Texas (p. 946).

It was agreed by counsel that auditors of the Standard Oil Co. were sent to St. Louis to audit the books of the Waters-Pierce Oil Co. and that the first audit was sometime in 1901, and that payments authorised by H. C. Pierce as early as June 15, 1900, were thereafter audited by the Standard Oil Co. (*id.* p. 923–924).

The defendant offered in evidence an agreement between the parties that the annual franchise taxes under the laws of Texas had been paid by the Waters-Pierce Oil Co., but the evidence was excluded and the defendant excepted (*id.* p. 997).

The judge in his charge to the jury, (*id.* p. 284–294) left to them two issues under the act of 1899 in the paragraphs VII and VIII of the charge, and three issues under the act of 1903 in paragraphs IX, X, and XI, *viz.*,

In par. VII (p. 288) he directed them that, if they found that the defendant, through its authorised agents, entered into or became a party to *an agreement or understanding* with the Standard Oil Co. on June 1, 1900, to fix or regulate the price of oil in Texas, and that the defendant remained or continued to be a party to the same and *persisted in carrying out* the same in Texas on that or any subsequent day prior to March 31, 1903 (the oil being the subject of local as distinguished from interstate traffic), they would find a verdict for the State on the issues submitted to them in paragraph VII of the charge, and, if they found for the State on these issues, each day between May 31, 1900, and March 31, 1903, during which the defendant *remained a party* to the agreement or understanding, would constitute a separate violation of the law.

In paragraph VIII (p. 289), he directed them that, if they found that on June 1, 1900, or any subsequent date prior to March 31, 1903, the defendant, through its authorised agents, had *brought about or permitted any combination or union of its capital* with that of the Standard Oil Co., whereby the price of such oil in Texas was *sought to be* fixed or regulated or *would be reasonably calculated to be* fixed or regulated, or whereby the trade in such oil in Texas was *sought to* be controlled or limited, they would find for the State on the issues submitted to them in paragraph VIII of the charge, and, if the defendant became a party to a pool of the character mentioned, each day between May 31, 1900, and March 31, 1903, that it *remained a party* to such pool would be a separate violation of the law.

In paragraph IX (p. 289) the judge directed the jury that, if they found that the defendant, through its authorised agents, *entered into a combination of its capital* with that of the Standard Oil Co. for the purpose of creating in Texas, *or which tended to create or carry out* in Texas restrictions in the free pursuit there of the business of selling such oil, *or to fix, maintain, or increase* the price of such oil there, *or to prevent or lessen competition* in its sale there, and that the defendant *remained* or *was a party to* and acted under such combination on March 31, 1903, or any subsequent date prior to April 29, 1907, they would find for the State on the issues submitted to them in paragraph IX of the charge, and each day between March 30, 1903, and April 29, 1907, that it remained a party to and acted under such trust would be a separate violation of the law.

In paragraph X (p. 290) he directed them that, if they found that *the direction of the affairs* of the defendant and those of the Standard Oil Co. *were under the same management or control* on March 31, 1903, or any subsequent date prior to April 29, 1907, and that they were placed under such common management or control by their respectively authorised officers under such circumstances that the common management or control created *or tended to create or carry out* restrictions in the sale of such oil in Texas, *or to fix, maintain, or increase* the price of such oil there, *or to prevent or lessen the competition* in its sale there, they would find for the State on the issues submitted to them in paragraph X of the charge, and, if the defendant entered

into such a monopoly, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly would constitute a separate violation of the law.

In paragraph XI (p. 291) he directed them that, if they found that the *Standard Oil Co. had* on March 31, 1903, or any subsequent date prior to April 29, 1907, *acquired* a majority of the capital stock of the defendant corporation, and *thereby effected a combination* of said two corporations, and that this stock was acquired and combination effected with the purpose and intention *on part of the* managing officers and directors of the *Standard Oil Co.* of preventing or lessening the competition in the sale in Texas of such oil, *or* that the effect of the said combination *tended to* affect or lessen such competition, they would find for the State on the issues submitted to them in paragraph XI of the charge, and, if the defendant entered into a monopoly of the character mentioned in this paragraph, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly constituted a separate violation of the law.

The judge also told the jury in paragraph V (p. 287) that the evidence relating to the doings and agreements of the agents of corporations other than the defendant and to those of the agents of the *defendant's predecessor* prior to June 1st 1900, and to those of the defendant's agents and the agents of other corporations and of individuals outside and within the state of Texas, both prior and subsequent to June 1, 1900, could not be considered by them *except* as afterwards stated, viz., If they found from the other evidence, independent of all declarations or statements of any persons, except their testimony by deposition or in court, that on June 1, 1900, there was formed or *existed* an agreement between the governing officers of the defendant and those of any of the other corporations, or any of the individuals, alleged to be *co-conspirators* with the dedefendant, relating to the management of its business, *then they might consider* for what, if anything, they thought it worth, such acts or declarations of all the parties to the agreement and of their authorised agents, as were done or made during the existence of the agreement and in furtherance of its execution, for the purpose of determining the character of the agreement and whether it contemplated a violation of the anti-trust laws of Texas.

In paragraph XIII (p. 292) he also told them that the evidence that had been introduced showing that the defendant had given *rebates and discounts* in the course of its dealings, and had entered into contracts and understandings other than those previously submitted to their consideration, or the evidence of its general course of dealings, including some of its business methods in *meeting competition*, did not tend to show any violation of the anti-trust laws of Texas, *unless it tended in some degree to establish some one or more of the issues* submitted to them in paragraphs VII–XI, and they would therefore return a verdict for the defendant, notwithstanding that evidence, unless they found in favor of the State on some one or more of those issues.

He directed the jury in paragraph XIV (p. 292), that, if they convicted the defendant of any violation of the act of 1899, which, he told them, was in force from May 31, 1900 till March 31, 1903 (p. 285), or of the act of 1903, which, he told them, was in force on and after March 31, 1903 (p. 286), they should specify the date or days for which it was so convicted, and should further specify that its permit to do business in Texas should be forfeited, and the amount adjudged against it for penalties, and that they should fix the penalties for any violations of the act of 1899 at not less than $200 or more than $5000 per day, and for any violations of the act of 1903 at $50 per day, for each and every day that they convicted it of having violated the law.

The counsel for the defendant requested various special charges to the jury (*id.* p. 294–312) which were refused and some of which are hereinafter mentioned.

The jury found a verdict against the defendant on each of the issues submitted to them for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties $1,549,500, and on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being 1488 days, and fixed the penalties at $74,400, and further found that the permit of the de-

fendant to do business in Texas should be cancelled, and found for the defendant upon all issues made by the pleadings and not submitted in the charge (*id.* p. 314–315).

On the same day, June 1st 1907, judgment was given on the verdict for $1,623,900 and costs, and directing that the permit be cancelled, and enjoining the defendant against doing business in Texas, except interstate business (*id.* p. 315).

A motion for a new trial was filed by the defendant on the same day (*id.* p. 315) and was afterwards overruled on the 7th June 1907, and the defendant excepted and appealed to the Court of Civil Appeals (p. 319–320) and subsequently on the 15th June gave a bond with sureties in the sum of $3,275,000 to supersede proceedings on the judgment (p. 320–322).

Immediately after the motion for a new trial, on the 1st of June 1907, the State filed an application for the appointment of a receiver of all the property of the defendant in the state (*id.* p. 323).* The application alleged the recovery of the judgment, and also that the charter of the defendant had been forfeited by proceedings in the Missouri courts, and that the property of the defendant within the state of Texas was inadequate to pay the judgment and by an act of April 11th 1907 (App. *post* p. 225) the State had a lien on all that property to secure payment of it, and that under the judgment of ouster in the case the defendant had no right to do business in the state and it was necessary to protect the rights of the State that the business should be kept a going concern in the state.

*The proceedings relating to the appointment of the receiver, beginning with this application, are also set out in the record in No. 360, p. 1–30, which are identical with pages 323–352 of the record in No. 359.

The defendant demurred to this application for insufficiency, and for answer thereto denied all and singular the allegations therein contained (*id.* p. 325).

Upon the hearing of this application on the 10th June 1907, as soon as counsel for the defendant had argued the demurrer, the judge said that it was unnecessary for counsel for the State to make any further argument, and, without hearing any evidence, announced his decision that he should take *judicial notice* of the proceedings in the main case and of *the judgment* against the defendant for violating the anti-trust laws, and he would assume that the defendant would file a proper supersedeas bond to supersede further proceedings on the judgment pending the appeal, but, as it had been brought to his attention through newspaper interviews with the defendant's counsel that the defendant intended to appeal from the judgment and to carry on its business in the same manner as before, notwithstanding the judgment, a receiver would be appointed to take charge of its property and business and deprive it of the instrumentalities by which it had so violated the law and would continue to violate the law, "and *without any evidence* being submitted to the court in connection with said application, the court thereupon announced that it would grant the said application and appoint a receiver as therein prayed for," as appears by the bill of exceptions (*id.* p. 341–342) signed by the judge (p. 349).

The defendant also appealed from the order appointing the receiver and gave a further bond with sureties in the sum of $100,000 to supersede proceedings under the order (*id.* p. 329, 349).

In the Court of Civil Appeals the two appeals were dealt with separately, and separate judgments were entered and separate records made, as previously explained (*ante* p. 2–3), which is the reason for there being two

writs of error in this Court and the motion to consolidate the two cases.

The Texas statutes regarding pleadings provide that a defendant may plead several matters, whether of law or fact, and shall file them all at the same time (Rev. Civ. St. 1895, art. 1262).

Matters of law are pleaded by way of demurrer or exceptions to the petition.

Dobbin v. *Bryan*, 5 Tex. 284.
Holliman v. *Rogers*, 6 Tex. 95.
Glasscock v. *Hamilton*, 62 Tex. p. 153.

And where a general exception is taken and the exception is only valid in part, it is the uniform practice to sustain the objection as to the valid part and overrule it as to the rest.

Morrison v. *Bean*, 15 Tex. p. 268.
Sampson v. *Williamson*, 6 Tex. p. 103.
Alford v. *Cochrane*, 7 Tex. p. 487.

By art. 1317–1318, *the judge's charge* to the jury is in writing and constitutes part of the record, and is regarded as excepted to and subject to revision on appeal without any bill of exceptions.

By art. 1320, instructions requested by a party and refused by the judge are filed and constitute part of the record and are subject to revision without any bill of exceptions.

The General Statutes 1905, c. 112, s. 5 (page 220), provide that the stenographer's notes shall be sent up as the record of the evidence, and, s. 7, that all objections to evidence shown thereby and the ruling of the court thereon shall be considered as separate bills of exceptions.

Summary of the Case.

The *old* Waters-Pierce Co. was incorporated in Missouri on the 1st May 1878 (*ante* p. 4, 19) and was engaged in business in Texas until May 1900, when its permit to do business was cancelled on account of certain violations of Texas anti-trust laws mentioned in *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28 (*ante* p. 7, 21).

When it was organised in 1878 the *old* Waters-Pierce Co. had agreed with the Standard Oil Co. (of Ohio) to confine its business to Texas and certain other places in which the firm that preceded it had carried on business (*ante* p. 5, 23). This agreement was not made in Texas.

In 1882 the Standard Oil Trust was formed for the purpose of acquiring and consolidating interests in various oil companies and firms (*ante* p. 5, 19), and the trustees acquired 60 per cent. of the shares in the *old* Waters-Pierce Co. and held them from that time until 1892. But the *old* Waters-Pierce Co. never became a party to the trust agreement, and H. C. Pierce, who owned the remaining 40 per cent. of the shares, did not sign it or deposit his shares under it (*ante* p. 6, 19–20). The Standard Oil Trust was dissolved in 1892, and the shares previously held by the trustees were then transferred to the Standard Oil Co. which afterwards held them for the same purposes as the trustees had held them (*ante* p. 7). On the 28th May 1900 when the *old* Waters-Pierce Co. was dissolved (*ante* p. 21) the Standard Oil Co, held 2750 shares and H. C. Pierce 1250 shares (*ante* p. 8).

On the 29th May 1900 the *defendant* was incorporated in Missouri, and on the 31st May a permit to do business in Texas was issued to it (*ante* p. 3, 21). In accordance with a previous understanding between the shareholders, the business and property of the *old* Waters-Pierce Co. were transferred to the defendant, and each of the shareholders in the *old* company received a number of shares in the

new company corresponding to the number held by them respectively in the old company (*ante* p. 8–9, 25).

All the shares in the *new* company were issued to H. C. Pierce (*ante* p. 25), and, in accordance with the understanding, he gave the Standard Oil Co. transfers in blank of 2750 shares, but they continued to stand in his name on the books till June 1904 (*ante* p. 9) for the purpose (as he testified and there was no evidence to the contrary) of enabling him absolutely to control the company (*ante* p. 25) as previously agreed, with the intention of carrying on the business in strict accordance with law (*ante* p. 22). These transactions did not take place in Texas.

The *defendant* did not enter into any agreement to confine its business to Texas or any other place, or agree to observe the agreement made by the *old* Waters-Pierce Co., but it continued to carry on business only in the territory in which the business to which it succeeded was already established and did not extend the business into other territory (*ante* p. 24–25).

The Standard Oil Co. never conducted any business in Texas or had a permit to do business there (*ante* p. 20).

The act of 1899 (*post* p. 213), by s. 1, makes it an offence for any corporation or persons to enter into or become a party to any agreement or understanding with any other corporation or persons *to regulate or fix the price* of any article.

By s. 2, it is made an offence to engage in a "monopoly," which is defined as any *union or combination of capital* by or between persons, firms, or corporations, whereby the purposes mentioned are accomplished or sought to be accomplished or whereby the several results are reasonably calculated to be produced, whether the combination is *effected* by partnership or union under the form of a corporation, or *by the acquisition of shares* or other corporate property.

A penalty of not less than $200 nor more than $5,000 is imposed by s. 5 on any person or corporation violating any provision of the act for every offence, and each day that such person or corporation shall continue to do so shall be a separate offence.

The defendant has been convicted under par. VII of the judge's charge (*ante* p. 44) of having entered into or become a party to an agreement or understanding with the Standard Oil Co. *to fix or regulate the price* of oil in Texas on account of the agreement of the *old* Waters-Pierce Co. in 1878 to confine its business to Texas and the other specified places.

And the defendant has also been convicted under par. VIII of the charge (*ante* p. 45) of having brought about *or permitted a combination or union of its capital* with that of the Standard Oil Co. by reason of the acquisition of a majority of its shares by the Standard Oil Co.

For these violations, which the jury find to have been committed on 1033 days, the penalties have been fixed at $1,549,500 (*ante* p. 47).

The act of 1903 (*post* p. 220), in s. 1 defines a trust as a *combination of capital*, skill, or acts by two or more persons or corporations to create or which may tend to create restrictions in trade, or to fix, increase, or reduce prices, or to prevent or lessen competition. In s. 2, it defines a monopoly as a *combination* of two or more *corporations*, where the direction of their affairs is brought under the same management or control for certain purposes, or where any corporation acquires the shares of another corporation for certain purposes.

By s. 11 every person or corporation who violates the act shall for every day that such violation is committed or continued forfeit $50.

The defendant has been convicted under par. IX, X, and XI of the judge's charge (*ante* p. 45–46) of having

violated these provisions on 1488 days and the penalti
have accordingly been fixed at $74,400 (*ante* p. 47).

The defendant's permit to do business in Texas has al
been cancelled (*ante* p. 48), and an order has been mad
appointing a receiver of its property, as mentioned *an*
p. 48–49.

The case was an action to recover penalties from th
defendant corporation under statutes of which the earlie
took effect on January 31, 1900. The corporation wa
formed on May 29, 1900.

The defendant could not be liable for anything don
before May 1900. It came into being innocent and it ca
be convicted only on proof of its own acts. The statute
could not be violated *by anybody* before May 1899.

The petition set forth a conspiracy entered into in Janu
ary 1870 by the founders of the Standard Oil Co. and othe
persons "*including the defendant*" to monopolise the bus
ness of selling petroleum and its products in the Unite
States, and alleged various agreements by these person
in pursuance of this conspiracy made in 1882 and othe
years long before 1900, and described in detail the acts o
other corporations and persons done before 1900, and ac
of the defendant in reducing prices and taking other step
in competing with its rivals in Texas (*Rec.* p. 33, 34–36
and upon this foundation of agreements entered into an
acts done by other persons made a variety of charge
against the defendant couched in the most inflammator
language well calculated to disguise the issue and arou
the prejudices of the jury.

Exceptions to the allegations in the petition as to th
acts and agreements of others long before 1899 were take
and overruled, and the case went to the jury upon th
petition (*Rec.* p. 69–76, par. 56–82; p. 97).

Though no evidence of the conspiracy alleged in the declaration was introduced, and though it was admitted that neither the defendant nor the *old* Waters-Pierce Co. nor H. C. Pierce was a party to the agreements of 1870 or 1882, evidence of the acts and declarations of persons and corporations other than the defendant was admitted on the ground that a conspiracy made in those years was *alleged*, and all the evidence offered of acts done by the *old* Waters-Pierce Co. in the course of competition was also admitted.

When the case was sent to the jury the questions whether the allegations of conspiracy and the various inflammatory accusations contained in the declaration were true were not submitted to the jury. These allegations were denied in the answer and by the verdict of the jury in favor of the defendant on all the issues except those submitted in paragraphs VII to XI of the charge it was established that they were not true.

The only questions submitted to the jury were in effect two:

Did the defendant on June 1, 1900, enter into or become a party to an agreement or understanding with the Standard Oil Co. to fix or regulate the price of oil in Texas and remain or continue to be a party to the same thereafter?

Did the defendant enter into a combination or unica of its capital with the Standard Oil Company for either of certain specified purposes?

The last issue is presented in different forms by paragraphs VIII to XI of the charge and the differences will hereinafter be pointed out.

Upon the first issue the jury were instructed that if they found that on June 1, 1900, "there was formed or existed an agreement between the governing officers of the defendant and the governing officers of any of the other corporations or any of the individuals alleged in the State's petition to be co-conspirators with the defendant relating to the

management of defendant's business" they might consider the acts and declarations of all the parties to the agreements or of their authorised agents "for the purpose of determining the character of the agreement and whether or not it contemplated a violation by the defendant of the anti-trust laws of Texas."

The jury were allowed, by this instruction, if they found that there was *any* agreement, to use all these acts and declarations of other parties for the purpose of determining its character and object. The judge expressly refused to instruct them that they could not consider the execution of the Standard Oil Trust agreement of January 2, 1882, or the contract between the Waters-Pierce Oil Co. and Royer Campbell in 1894, and further refused to instruct them to disregard all evidence with respect to actions and transactions prior to May 31st 1900 (Special Charges Nos. 12, 13, and 15, *Rec.* p. 302, 303, 305).

The jury was also, by paragraph XIII of the charge, permitted to consider the evidence of contracts, discounts and dealings by the defendant, "including its business methods in meeting competition," although the court said that none of this evidence tended to show any violation of the law of Texas upon the issues submitted. In other words, the court allowed the jury to consider evidence which did not even tend to show a violation of Texas laws in determining whether the defendant agreed or formed a combination of capital to violate those laws.

In this way all the evidence in the case however immaterial was submitted to the jury and its full effect upon their prejudices was secured.

Assignment of Errors

The assignment of errors is the same in both cases (*Rec.* No. 359, p. 1188; *Rec.* No. 360, p. 84) and is as follows,

The defendant the said Waters-Pierce Oil Company says that in the record and proceedings aforesaid and in giving and affirming the judgment aforesaid of the District Court and in the order appointing a receiver as a consequence of the said judgment there is manifest error in this to wit

1 That it was decided in and by the said judgment that the defendant the Waters-Pierce Oil Company which was incorporated under the laws of Missouri on the 29th May 1900 and not before was liable to the penalties imposed by the statute of 1903 in the record mentioned for and on account of the acts of the Standard Oil Company in acquiring a majority of the shares of the Waters-Pierce Oil Company before the said statute of 1903 was passed or took effect which acts were not done in the State of Texas And by means thereof the defendant the Waters-Pierce Oil Company is thereby deprived of its property without due process of law And it was also thereby decided that the said statute of 1903 was valid and not repugnant to the Constitution of the United States whereas it ought to have been decided that the same so far as it had the effect so given to it was invalid and repugnant to the provision of the said Constitution forbidding the passage of any ex post facto law by any state

2 There is also manifest error in this that it was decided in and by the said judgment that the said Waters-Pierce Oil Company was liable to the penalties imposed by the statute of 1899 in the record mentioned for and on account of a supposed union or combination of its capital with the capital of the Standard Oil Company by means of acts done by the said Standard Oil Company long before the passage of the said statute and long before the incorporation of the said Waters-Pierce Oil Company in acquiring a majority of the shares of another then existing company (hereinafter called the old Waters-Pierce Company) incorporated under the laws of Missouri by the same name as the said Waters-Pierce Oil Company which acts were not done in the state of Texas And by means thereof the defendant the Waters-Pierce Oil Company is deprived of its property without due process of law And it was also thereby decided that the said statute was valid and not repugnant to the said Constitution whereas it ought to have been decided that the same so far as it had the effect so given to it was invalid and repugnant to the pro-

vision of the said Constitution forbidding the passage of any ex post facto law by any state

3 There is also manifest error in this that it was decided in and by the said judgment that the defendant the Waters-Pierce Oil Company was liable to the penalties imposed by the said statutes of 1899 and 1903 respectively for and on account of certain supposed agreements or understandings entered into before the passage of either of the said statutes between the Standard Oil Company and the old Waters-Pierce Company whose property and business the defendant the Waters-Pierce Oil Company afterwards acquired without becoming in any way bound by or answerable in respect of any of the said supposed agreements or understandings and never became so bound or answerable or did any act in carrying any of them into effect which supposed agreements or understandings if they existed were entered into out of the state of Texas And by means of the said decision the said Waters-Pierce Oil Company is deprived of its property without due process of law contrary to the provisions of the said Constitution

4 There is also manifest error in this that the Court upon hearing the exceptions of the defendant to the plaintiff's amended original petition before the said trial overruled among others of them the exception (No. 9) whereby the defendant excepted to all parts and paragraphs of the said petition by which it was sought to hold the defendant subject to the provisions of the said statute of 1903 and to cancel its permit to do business in Texas and to recover penalties against it on account of the alleged holding or ownership by the Standard Oil Company of New Jersey of a majority of its stock because according to the allegations in the said petition the said stock was so held and owned by the said Standard Oil Company at and long prior to the passage of the said statute of 1903 and its ownership of the said stock being a vested right and not in violation of the laws of the state of Texas when the defendant's permit to transact business in Texas was granted to it on May 31st 1900 it was not competent or within the constitutional power of the legislature of the state of Texas to interfere with such ownership or divest the said Standard Oil Company of its said property or to make it an offence by the defendant subjecting it to penalties and to a forfeiture of its said permit for such vested ownership to continue and that the said statute of 1903 is violative of the Constitution of the United States for that it is both ex post facto and retroactive in its operation and for the additional reason that if given the effect of prohibiting the continuance of such ownership of the said stock by the said Standard Oil Company and of making it an offence on the part of the defendant for such holding to continue it would

deprive the defendant of its property without due process of law and deny to the defendant the equal protection of the laws and impair the obligations of a contract contrary to the provisions of the said Constitution in the said exception referred to and for these reasons the defendant therein said that it was apparent that all allegations in the said petition with respect to the alleged ownership of the defendant's stock by the Standard Oil Company should be stricken out and of this special exception the defendant prayed the judgment of the Court And the said exception being overruled the defendant was by the said judgment made liable to the penalties imposed by the said statute of 1903 for and on account of the acts of the Standard Oil Company in acquiring the said majority of the stock of the defendant before the passage of the said statute of 1903 and continuing afterwards to hold the same And the defendant has thereby been denied the equal protection of the laws and is deprived of its property without due process of law And it was also thereby decided that the said statute of 1903 was valid and not repugnant to the Constitution of the United States whereas it ought to have been decided that the same so far as it had the effect so given to it was invalid and repugnant to the provision of the said Constitution forbidding the passage of any ex post facto law by any state

5 There is also manifest error in this that the Court in like manner also overruled another of the said exceptions (No. 20) to the said petition whereby if the Court should construe the plaintiff's petition as alleging that the defendant was the same corporation—the same entity as the old Waters-Pierce Company (which the said petition does plainly allege) then the defendant excepted to all the allegations in the said petition whereby it was sought to recover penalties of the defendant under the provision of the said statute of 1899 on account of the alleged ownership by the said Standard Oil Company of the stock of the defendant or on account of the alleged agreement between the defendant and the said Standard Oil Company or on account of the alleged agreement between the defendant and the said Standard Oil Company and the other corporations and persons mentioned in the said petition and said that the same were insufficient for the reason that if the petition be so construed it then affirmatively appeared from the said petition that the said alleged ownership of the stock of the defendant by the said Standard Oil Company existed at the time of and prior to the taking effect of the said statute of 1899 and that all of the said alleged agreements and understandings were made and entered into prior to the passage of the said statute and for the reason that the said statute was intended to act prospectively only and if intended to apply to ownerships by one corporation of the stock of another corporation or to apply to agreements of the character of the said alleged agree-

ments so set forth in the said petition it was only intended to apply to such ownerships of stock as should be acquired after the taking effect of the said statute and to such agreements as should be made or entered into after the taking effect of the said statute and if the said statute should be construed as having been intended by the legislature to authorise the recovery against the defendant of the penalties provided for in the said statute on account of the continuation of the said alleged ownership of its stock by the said Standard Oil Company or on account of the performance by this defendant of any of the alleged agreements so alleged to have been made prior to the taking effect of the said statute then such act so construed would be violative of the said Constitution in that it would be retroactive in its effect and impair the obligations of contracts and deny to the defendant the equal protection of the laws and would take the property of the defendant without due process of law and of this the defendant prayed judgment of the Court And the said exception being overruled the defendant was by the said judgment made liable to the penalties imposed by the said statute of 1899 for and on account of the acts of the Standard Oil Company in acquiring the said stock of the old Waters-Pierce Company before the passage of the said statute of 1899 and continuing afterwards to hold the same and taking a corresponding majority of the shares or the beneficial interest in such majority of the shares of the defendant the Waters-Pierce Oil Company issued to the said Standard Oil Company for its interest in the old Waters-Pierce Company in which acts of the said Standard Oil Company the defendant had no part and for and on account of the alleged agreements and understandings between the old Waters-Pierce Company and the said Standard Oil Company and the said other corporations and persons entered into before the passage of the said statute of 1899 to none of which agreements or understandings the defendant ever became a party or became in any way answerable therefor And the defendant is thereby denied the equal protection of the laws and is deprived of its property without due process of law

6 There is also manifest error in this that the Court in like manner also overruled another of the said exceptions (No. 21) to the said petition whereby the defendant excepted to all the allegations in the said petition whereby it was sought to recover penalties of the defendant under the provisions of the said statute of 1903 on account of the alleged ownership by the said Standard Oil Company of the stock of the defendant or on account of the alleged agreements between the defendant and the said Standard Oil Company or on account of the alleged agreements between the defendant and the said Standard Oil Company and the other corporations and persons mentioned in the said petition and said that the same

were insufficient for the reason that it affirmatively appeared from the said petition that the alleged ownership of the stock of the defendant by the said Standard Oil Company existed at the time of and prior to the passage of the said statute of 1903 and that all of the alleged agreements and understandings were made and entered into prior to the passage of the said statute and for the reason that the said statute was intended to act prospectively only and if intended to apply to ownerships by one corporation of the stock of another corporation or to apply to agreements of the character set forth in the said petition it was only intended to apply to such ownerships of stock as should be acquired after the taking effect of the said statute and to such agreements as should be made or entered into after the taking effect of the said statute and if the said statute should be construed as having been intended by the legislature to authorise the recovery against the defendant of the penalties provided for in the said statute on account of the continuance of the said alleged ownership of the stock by the said Standard Oil Company or on account of the performance by the defendant of any of the agreements so alleged to have been made prior to the taking effect of the said statute such statute so construed would be violative of the said Constitution in that it would be retroactive in its effect and impair the obligations of contracts and deny to the defendant the equal protection of the laws and would take the property of the defendant without due process of law and of this the defendant prayed judgment of the Court And the said exception being overruled the defendant was by the said judgment made liable to the penalties imposed by the said statute of 1903 for and on account of the acts of the Standard Oil Company in acquiring the said stock of the old Waters-Pierce Company before the passage of the said statute of 1903 and continuing afterwards to hold the same and taking a corresponding majority of the shares or the beneficial interest in such majority of the shares of the defendant the Waters-Pierce Oil Company issued to the said Standard Oil Company for its interest in the old Waters-Pierce Company in which acts of the said Standard Oil Company the defendant had no part and for and on account of the alleged agreements and understandings between the old Waters-Pierce Company and the said Standard Oil Company and the said other corporations and persons entered into before the passage of the said statute of 1903 to none of which agreements or understandings the defendant ever became a party or became in any way answerable therefor And the defendant is thereby denied the equal protection of the laws and is deprived of its property without due process of law

7 There is also manifest error in this that the Court in like manner overruled another of the said exceptions (No. 25) to the said

petition whereby the defendant objected that each of the said statutes of 1899 and 1903 was so indefinite vague and uncertain in its terms that it could not be ascertained by the language used what particular acts constituted an offence subjecting the offender to punishment as therein prescribed and for that reason a person could not know in advance of committing the act whether he was violating the law and that to subject the defendant to heavy penalties for an alleged violation thereof would result in the taking of the defendant's property without due process of law contrary to the provisions of the said Constitution And the said exception being overruled the defendant is by the said judgment made liable to the penalties imposed by the said statutes of 1899 and 1903 respectively and is thereby deprived of its property without due process of law accordingly

8 There is also manifest error in this that the Court in like manner overruled others of the said exceptions (No. 52 and 53) to the said petition whereby the defendant objected that the said statutes of 1899 and 1903 respectively were so indefinitely framed and of such doubtful construction that they could not be understood either from the language in which they were expressed or from some other written law of the state and by reason of their failure to designate an offence by the plain import of their words the infliction of the penalties prescribed by the said statute would be the taking of property without due process of law contrary to the provisions of the said Constitution And the said exception being overruled the defendant is by the said judgment made liable to the penalties imposed by the said statutes of 1899 and 1903 respectively and is thereby deprived of its property without due process of law accordingly

9 There is also manifest error in this that evidence having been adduced at the trial of the said cause that the Standard Oil Company from some time in the year 1882 owned a majority of the shares of the old Waters-Pierce Company down to the incorporation of the defendant the Waters-Pierce Oil Company on the 29th May 1900 and that on or about the 24th September 1900 a majority of the shares of the defendant the Waters-Pierce Oil Company which had up to that time been held by H. C. Pierce in trust for the said Standard Oil Company (the same having been so issued to him upon the formation of the defendant company on account of the interest of the said Standard Oil Company in the old Waters-Pierce Company) were transferred to the said Standard Oil Company by an indorsement of the certificates therefor in blank by the said H. C. Pierce without any evidence of the registration of any transfer of the same on the books of the defendant company until early in the year 1904 when the said Standard Oil Company caused the same to

be transferred on the said books into the name of M. M. Van Beuren and evidence having been also adduced at the said trial that the old Waters-Pierce Company carried on its business throughout the whole of Texas and in certain other states and in Mexico and obtained its supplies of refined oil almost exclusively from the Standard Oil Company and that the said Standard Oil Company did not carry on such business in the said territory in which the old Waters-Pierce Company so carried on business and that the defendant the Waters-Pierce Oil Company after acquiring the business of the old Waters-Pierce Company as above mentioned carried on the said business in the same territory and in the same way without extending its business into other territory and that the said Standard Oil Company did not extend its business into the territory in which the defendant so carried on business the judge before whom the said cause was tried at the said trial although there was no other evidence of any such agreement or understanding between the defendant and the Standard Oil Company as next hereinafter mentioned or of any other act by the defendant in carrying any other such agreement or understanding into effect directed the jury (in paragraph VII of his charge) upon the said evidence that if they found that the defendant the Waters-Pierce Oil Company entered into or became a party to an agreement or understanding with the Standard Oil Company on June 1 1900 to fix or regulate the price in Texas of oil refined from petroleum and if they further found that the defendant remained or continued to be a party to the said agreement or understanding if any and persisted in carrying the same out in Texas on June 1 1900 or any subsequent date or dates prior to March 31 1903 and that the oil with reference to which the said agreement or understanding was so made and carried out was the subject of local as distinguished from interstate commerce the jury should return a verdict for the state and thereby say that they found in favor of the state upon the issues submitted for their consideration in paragraph seven (VII) of the Court's charge and further instructed the jury that each day between May 31 1900 and March 31 1903 during which the defendant remained a party to the agreement or understanding therein mentioned would constitute a separate and distinct violation of the anti-trust laws of Texas And the said judge also directed the jury that the said statute of 1899 was in force on May 31 1900 and thenceforth until March 31 1903 and that the said statute of 1903 became effective on March 31 1903 and has since continued in force and that if the jury should convict the defendant of any violation or violations of the said statute of 1899 they should specify in their verdict the date or days for which it was so convicted and further specify therein that as a result of such conviction its permit to do business in Texas should be forfeited and the amount of money which should be adjudged against it as penalties for such

violations fixing the same at not less than $200 or more than $5,000 per day for each day that they should find it had so violated the law And the jury in pursuance of the said directions found for the plaintiff against the defendant on the issues submitted to them in the said paragraph (VII) of the judge's charge for each of the days between May 31 1900 and March 31 1903 stating the same in their verdict as being 1033 days and fixed the penalties for all the said days as hereinafter mentioned and further found that the permit of the defendant to do business in Texas should be cancelled By means whereof the jury found that any such agreement or understanding as above mentioned entered into between the old Waters-Pierce Company and the said Standard Oil Company became an agreement or understanding on the part of the defendant the Waters-Pierce Oil Company with the said Standard Oil Company as soon as the defendant acquired the property and business of the old Waters-Pierce Company and conducted the said business in the same manner and in the same territory as the old Waters-Pierce Company had done and without extending the said business into any other territory although the defendant had not otherwise than by its said acts entered into any such agreement or understanding and also that the defendant the Waters-Pierce Oil Company having entered into such an agreement or understanding as mentioned in the said paragraph of the judge's charge although not in the state of Texas and having persisted in carrying the same out in Texas on the 1st June 1900 was guilty of a violation of the said law on every subsequent day including Sundays and holidays down to the 31st March 1903 although it did not on any such subsequent day or did not upon some of such subsequent days do any act in Texas in or towards carrying out the said agreement or understanding but only remained a party thereto And by the judgment upon the said verdict upon the issues submitted to the jury in the said paragraph (VII) of the judge's charge the defendant the Waters-Pierce Oil Company is deprived of its property without due process of law

10 There is also manifest error in this that upon the evidence mentioned in the last preceding paragraph without any other evidence or suggestion of such a combination or union as next hereafter mentioned the said judge also directed the jury (in paragraph VIII of his charge) that if they found that on June 1 1900 or any date subsequent thereto and prior to March 31 1903 the defendant had brought about or permitted any combination or union of its capital with the capital of the said Standard Oil Company whereby the price in Texas of such oil as mentioned in the said clause of the charge was sought to be fixed or regulated or would be reasonably calculated to be fixed or regulated or whereby the trade in such oil in Texas was sought to be controlled or limited the jury should return a verdict for the state

and thereby say that they found for the state upon the issues submitted for their consideration in paragraph eight (VIII) of the Court's charge and further directed the jury that if the defendant became a party to a pool of the character mentioned in that paragraph each day between May 31 1900 and March 31 1903 that it remained a party to such pool would constitute a separate violation of the anti-trust laws of Texas And the jury in pursuance of the said directions found for the plaintiff against the defendant on the issues submitted to them in the said paragraph of the judge's charge for each of the days between May 31 1900 and March 31 1903 stating the same in their verdict as being 1033 days and in pursuance of the said directions and the other directions hereinbefore mentioned fixed the penalties for the violations of law of which the defendant was convicted by their verdict upon the issues submitted to them in the two paragraphs seven (VII) and eight (VIII) of the judge's charge at $1,549,500 and further found that the permit of the defendant to do business in Texas should be cancelled By means whereof the jury found the defendant the Waters-Pierce Oil Company guilty of having brought about or permitted such a combination or union of its capital with the capital of the Standard Oil Company as above mentioned by means of the acts of the said Standard Oil Company in acquiring a majority of the shares of the old Waters-Pierce Company long before the passage of the said statute of 1899 and before the defendant came into existence and in holding the said shares until the defendant was incorporated and acquired the property and business of the old Waters-Pierce Company and then taking the beneficial interest in a corresponding majority of the shares of the defendant the Waters-Pierce Oil Company for its interest in the old Waters-Pierce Company in which acts of the said Standard Oil Company the defendant had no part and although none of the said acts were done in the state of Texas and although no act was done by the defendant in Texas in pursuance of the supposed combination or union or for any of the supposed purposes thereof on some or any of the days for which it was so convicted And by the judgment upon the said verdict upon the last mentioned paragraph (VIII) of the judge's charge the defendant the Waters-Pierce Oil Company is deprived of its property without due process of law contrary to the provisions of the said Constitution and it was thereby decided that the said statute of 1899 was valid and not repugnant to the said Constitution whereas it ought to have been decided that the same so far as it had the effect so given to it was invalid and repugnant to the provision of the said Constitution forbidding the passage of any ex post facto law by any state

11 There is also manifest error in this that upon the evidence mentioned or referred to in the next preceding paragraph hereof without any other evidence or suggestion of any such combination as next

hereinafter mentioned and although it was agreed by the parties at the said trial for the purposes of this case that the said Standard Oil Company had from a time long before the passage of the said statute of 1903 owned a majority of the shares of the defendant the Waters-Pierce Oil Company the said judge also directed the jury (in paragraph IX of his charge) that if they found that the defendant entered into a combination of its capital with the capital of the said Standard Oil Company for the purpose of creating in Texas or which tended to create in Texas or carry out in Texas restrictions in the free pursuit in that state of the business of selling such oil as is mentioned in the said paragraph of the charge or to fix maintain or increase the price of such oil in Texas or to prevent or lessen competition in Texas in the sale of such oil and that the defendant remained or was a party to and acted under such combination on March 31 1903 or any date subsequent thereto and prior to April 29 1907 the jury should return a verdict for the state and thereby say that they found for the state upon the issues submitted for their consideration in paragraph nine (IX) of the Court's charge and further directed the jury that if the defendant became a party to a trust of the character mentioned in that paragraph of the charge each day between March 30 1903 and April 29 1907 that it remained a party to and acted under such trust would constitute a separate violation of the anti-trust laws of Texas and that if the jury should convict the defendant of any violations of the said statute of 1903 they should specify in the verdict the date or days for which it was so convicted and further specify therein that as a result of such conviction its permit to do business in Texas should be forfeited and the sum of money that should be adjudged against it as a penalty for such violation fixing the sum at $50 per day for each day that they should convict it of having violated the said law And the jury, in pursuance of the said directions found for the plaintiff against the defendant on the issues submitted to them by the said paragraph of the judge's charge for each of the days between April 1 1903 and April 29 1907 stating the same in their verdict as being 1488 days and fixed the penalties for all the said days as hereinafter mentioned and further found that the permit of the defendant to do business in Texas should be cancelled By means whereof the jury found the defendant the Waters-Pierce Oil Company guilty of having entered into such a combination as last above mentioned by means of the acts of the said Standard Oil Company in acquiring the said majority of the shares of the said Waters-Pierce Oil Company long before the passage of the said statute of 1903 although none of the said acts were done in the state of Texas and although no act was done by the defendant in Texas in pursuance of the supposed combination or for any of the supposed purposes thereof on some or any of the days for which it was so convicted and although the defendant had no means

of requiring or inducing the said Standard Oil Company to part with the said majority of shares or any part thereof

12 There is also manifest error in this that the said judge also directed the jury (in paragraph X of his charge) that if they found that the direction of the affairs of the defendant corporation and the affairs of the said Standard Oil Company was under the same management and control on March 31 1903 or on any date subsequent thereto and prior to April 29 1907 and that they were placed under such management or control by their respectively authorised officers under such circumstances that such common management or control created or tended to create or carry out restrictions in the sale in Texas of such oil as is referred to in the said paragraph of the charge or to fix maintain or increase the price in Texas of such oil or to prevent or lessen in Texas the competition in the sale of such oil the jury should return a verdict for the state and thereby say that they found for the state on the issues submitted for their consideration in paragraph ten (X) of the Court's charge and further directed the jury that if the defendant entered into a monopoly of the character mentioned in that paragraph of the charge each day between March 30 1903 and April 29 1907 that it remained a party to such monopoly constituted a separate violation of the anti-trust laws of Texas And although there was no evidence that the direction of the affairs of the defendant and the said Standard Oil Company was after the passage of the said statute of 1903 brought under the same management or control or was under the same management or control on the 31st March 1903 when the said statute was passed or on the first or second or any subsequent day thereafter or that the said Standard Oil Company had any power to bring the direction of the affairs of the said two corporations under the same control or management until the said majority of the shares in the defendant corporation were transferred on its books into the name of M. M. Van Beuren as hereinbefore mentioned in the year 1904 or that the said Standard Oil Company exercised any such power by doing so either before or after the same were so transferred or that any of the things supposed to have been done had been done in Texas except carrying on business there as hereinbefore mentioned the jury in pursuance of the said direction of the judge found for the plaintiff against the defendant on the issues submitted to them by the said paragraph ten (X) of the judge's charge for each of the days between April 1 1903 and April 29 1907 stating the same in their verdict as being 1488 days and fixed the penalties for all the said days as hereinafter mentioned and further found that the permit of the defendant to do business in Texas should be cancelled By means whereof the jury found the defendant the Waters-Pierce Oil Company guilty of the offence of bringing the direction of its affairs

under the same management and control as those of the said Standard Oil Company although it had had no part in doing so itself and although whatever was supposed to have been done to bring the direction of the affairs of the said two corporations under the same management and control had not been done in Texas and had been done before the passage of the said statute of 1903 or had not been done on some of the days for which it was so convicted and was not in fact done at all

13 There is also manifest error in this that the said judge also directed the jury (in paragraph XI of his charge) that if they found that the Standard Oil Company had on March 31st 1903 acquired a majority of the capital stock of the defendant the Waters-Pierce Oil Company and thereby effected a combination of the said corporations with the purpose and intention therein mentioned or the part of the managing officers and directors of the said Standard Oil Company the jury should return a verdict for the state and thereby say that they found in favor of the state upon the issues submitted for their consideration in paragraph eleven (XI) of the Court's charge and further directed the jury that each day between March 30 1903 and April 29 1907 that the defendant remained a party to such monopoly constituted a separate violation of the anti-trust laws of Texas And although at the said trial no evidence was adduced that the said Standard Oil Company acquired on or after the 31st March 1903 such a majority of the said capital stock or any shares necessary to make such majority or ever acquired any such shares within the state of Texas and it was agreed by the parties at the said trial that since a time long previous to the 31st March 1903 the said Standard Oil Company had owned more than a majority of the said capital stock the jury in pursuance of the said direction found for the plaintiff against the defendant upon the issues so submitted to them for each of the days between April 1 1903 and April 29 1907 stating the same in their verdict as being 1488 days and in pursuance of the said directions and the other directions hereinbefore mentioned fixed the penalties for the violations of law of which the defendant was convicted by their verdict upon the issues submitted to them in the three paragraphs nine (IX) ten (X) and eleven (XI) of the judge's charge at $74,400 and further found that the permit of the defendant to do business in Texas should be cancelled By means whereof the jury found the defendant the Waters-Pierce Oil Company guilty of having effected a combination of itself and the said Standard Oil Company solely by reason of the acts of the said Standard Oil Company done long before the passage of the said statute of 1903 in acquiring the said majority of the shares of the said Waters-Pierce Oil Company although none of the said acts were done in the state of Texas and although no act was done by

the defendant in Texas in pursuance of the supposed combination or for giving effect to the supposed purpose or intention of the managing officers of the said Standard Oil Company on some or any of the days for which the defendant was so convicted And by the judgment upon the said verdict upon the issues submitted to the jury in the three last mentioned paragraphs of the judge's charge respectively the said Waters-Pierce Oil Company is deprived of its property without due process of law contrary to the provisions of the said Constitution and it was thereby decided that the said statute of 1903 was valid and not repugnant to the said Constitution whereas it ought to have been decided that the same so far as it had the effect so given to it was invalid and repugnant to the provision of the said Constitution forbidding the passage of any ex post facto law by any state

14 There is also manifest error in this that the said judge also declared his opinion to the jury (in paragraph XI of his charge) that if the said Standard Oil Company acquired a majority of the capital stock of the defendant the Waters-Pierce Oil Company a combination of the said two corporations would be thereby effected and with that direction he left the said issues to the jury whereas a combination of the said two corporations would not be thereby effected And the jury in pursuance of the said direction found for the plaintiff against the defendant upon each of the issues submitted to them respectively in the four paragraphs (eight (VIII) nine (IX) ten (X) and eleven (XI) of the judge's charge and thereby found the defendant guilty of having effected such combination solely by reason of the acts of the said Standard Oil Company in acquiring the said majority of shares although none of the said acts were done in the State of Texas and although no act was done by the defendant in Texas in pursuance of the supposed combination or for giving effect to any supposed purpose or intention thereof on some or any of the days for which the defendant was so convicted And by the judgment upon the said verdict upon the issues submitted to the jury in the four last mentioned paragraphs of the judge's charge respectively the defendant the said Waters-Pierce Oil Company is punished for an act which it could not control and an offence that it could not commit and is thereby deprived of its property without due process of law contrary to the provision of the said Constitution

15 There is also manifest error in this that the said judge upon the trial of the said cause arbitrarily and without any regard to the rules of law admitted evidence of (1) the incorporation of the Standard Oil Company of Ohio on or about the 10th January 1870 (2) the incorporation of the old Waters-Pierce Company in Missouri

on the 1st May 1878 and the increase of its capital on the 13th June 1882 (3) the agreement of the 2nd January 1882 by which the Standard Oil Trust was formed and to which the old Waters-Pierce Company or the defendant the Waters-Pierce Oil Company or H. C. Pierce who owned about two-fifths of the shares in these two companies never became a party (4) the incorporation of the Standard Oil Company of New Jersey herein referred to as the Standard Oil Company on the 1st August 1882 (5) the ownership by the Standard Oil Company of the majority of the shares of several other companies as stated in the agreement of counsel designated Stipulation No. 1 (6) the judgment in favor of the state of Texas against the old Waters-Pierce Company on the 15th June 1897 for the forfeiture of its permit to do business in Texas which judgment was affirmed by this Court on or about the 19th March 1900 (177 U. S. 28) and also (7) the testimony of several witnesses relating to the doings and agreements of the agents of corporations other than the defendant and of the agents of the old Waters-Pierce Company prior to the incorporation of the defendant the Waters-Pierce Oil Company and prior to the 1st June 1900 and to the doings and agreements of the defendant's agents and the agents of other corporations outside the state of Texas and to the doings and agreements of individuals both prior and subsequent to the 1st June 1900 and both outside and within the state of Texas (to all of which evidence and testimony respectively counsel for the defendant duly objected at the trial as appears by the record) And although there was not any other evidence nor any evidence whatever of an agreement at any time between the defendant or the governing officers of the defendant and any other persons whatever relating to the management of the defendant's business yet the said judge arbitrarily and without any regard to the rules of law and intending that the jury should identify the defendant with the old Waters-Pierce Company as charged in the petition of the state and should convict the defendant of violations of the said anti-trust laws upon the issues submitted to them in the five paragraphs last above mentioned of the judge's charge without any legal evidence of any such violation and should for that purpose consider irrelevant evidence under color of first finding a conspiracy of which there was no evidence whatever overruled all the objections of the defendant to the admission of the said evidence and directed the jury (in the division V of his charge) that if they found from the other evidence in the case independent of all declarations or statements made by any person or persons except their evidence given as witnesses personally or by deposition that on June 1 1900 there was formed or existed an agreement between the governing officers of the defendant and the governing officers of any of the other corporations alleged in the state's petition to be co-conspirators with the defendant relating

to the management of the defendant's business or between the governing officers of the defendant and any of the individuals alleged in the State's petition to be co-conspirators with the defendant relating to the management of the defendant's business then the jury might consider for what if anything they thought it worth such acts or declarations of all the parties to the said agreement and such acts and declarations of their authorised agents if any as were done or made during the existence of such agreement and in furtherance of its execution for the purpose of determining the character of such agreement and whether or not it contemplated a violation by the defendant of the anti-trust laws of Texas but that none of the said evidence could be considered by the jury for any other purpose whatever and none of it could be so considered by the jury against the defendant for the said purposes except such of it if any as they should think proper to be considered when tested by the rules so stated relating to its competency And also directed the jury (in the division XIII of his charge) that they might consider so far as it tended to establish some one or more of the issues submitted for their consideration in the said five paragraphs (VII to XI) of his charge the evidence introduced before them that the defendant had given rebates and discounts in the course of its dealings and that the defendant had made contracts and entered into understandings other than those submitted for their consideration in the said five paragraphs of the charge and also the evidence introduced before them of the general course of dealings of the defendant in Texas and elsewhere including some of its business methods in meeting competition although he directed them that none of this evidence showed or tended to show any violation of the anti-trust laws of Texas unless it tended to establish some one or more of the said issues so submitted for their consideration And the verdict was accordingly given for the State upon the said issues submitted to the jury whe[illegible]s according to due process of law it ought to have been given for the defendant And upon the appeal of the defendant the Court of Civil Appeals in affirming the said judgment unreasonably and wilfully disregarded the questions thereby raised under the said Constitution as well as the rules of evidence according to the usage and practice prevailing in Texas And the defendant is thereby deprived of its property without due process of law contrary to the provisions of the said Constitution

16 There is also manifest error in this that the said judge at the trial refused to direct the jury as requested by the defendant (Special Charges refused No. 5) as follows

"You are instructed that inasmuch as the defendant is a corporation incorporated and existing under the laws of the state of Missouri the question of the legality of the ownership of a majority of its

stock by the Standard Oil Company is not an issue in this case and in this connection you are further instructed that the anti-trust laws of Texas being designed merely to prohibit unlawful combinations or agreements having the purpose of fixing and regulating prices and other forbidden purposes denounced by such laws could not be violated by the mere ownership by the Standard Oil Company of a majority of the stock of the defendant"

Whereas the said direction ought to have been given so that the jury might not convict the defendant of violation of the anti-trust laws of Texas merely on account of the acts of the Standard Oil Company in owning in another state a majority of the stock of the defendant And the verdict having been given for the State the defendant is by reason of the said refusal deprived of its property by the said judgment without due process of law contrary to the provisions of the said Constitution

17 There is also manifest error in this that the said judge at the trial refused to direct the jury as requested by the defendant (Special Charges refused No. 7) as follows

"You are instructed that it is admitted by the defendant that the Standard Oil Company of New Jersey acquired a majority of the shares of stock of the defendant company on or about the 4th day of September 1900 and thereafter continued to own the same Therefore the Court further instructs the jury that the acquiring and owning of said shares of stock by said Standard Oil Company did not constitute a violation of the act approved March 31st 1903 even though the jury may believe that the said Standard Oil Company voted said shares of stock at the meeting of the stockholders of the defendant company for the election of director of said defendant company"

And there is also manifest error in this that the said judge also refused to direct the jury as requested by the defendant (Special Charges refused No. 24)

"You are instructed that since the Standard Oil Company acquired a majority of the stock of the defendant prior to the enactment of the anti-trust act of 1903 and since the defendant company being a corporation created by the laws of Missouri the acquisition of such stock by the Standard Oil Company cannot be inquired into by the courts of Texas but must be in all things treated as legal and valid the inhibition of the anti-trust act of 1903 against any corporation's acquiring the shares of stock of any other corporation for the purpose of preventing or lessening competition or tending to affect or lessen competition can have no application to this case"

Whereas the said directions ought respectively to have been given so that the jury might not convict the defendant of violation of the said statute of 1903 upon any of the three issues submitted to them

as aforesaid in the paragraphs nine (IX) ten (X) and eleven (XI) of the judge's charge on account of the acts of the Standard Oil Company in acquiring the said majority of shares before the passage of the said statute of 1903 And the verdict having been given for the State the defendant is by reason of the said refusals deprived of its property by the said judgment without due process of law and subjected to the said penalties by virtue of an ex post facto law passed by the state of Texas contrary to the provisions of the said Constitution

18 There is also manifest error in this that the said judge at the trial refused to direct the jury as requested by the defendant (Special Charges refused No. 9) as follows

"You are instructed that it is not a violation of the laws of the state of Texas and has not been a violation of such laws or any laws at any time since May 31st 1900 for the Standard Oil Company of New Jersey or any other person or corporation to own a part of the stock of the defendant Waters-Pierce Oil Company and you will therefore disregard any evidence that has been introduced before you upon this subject"

Whereas the said direction ought to have been given so that the jury might not convict the defendant of violation of the anti-trust laws of Texas merely on account of the acts of the Standard Oil Company in owning in another state a majority of the stock of the defendant And the verdict having been given for the state the defendant is by reason of the said refusal deprived of its property by the said judgment without due process of law contrary to the provisions of the said Constitution

19 There is also manifest error in this that the said judge at the trial refused to direct the jury as requested by the defendant (Special Charges No. 13) as follows

"You are instructed that in view of the fact that the Standard Oil Trust Agreement of January 2nd 1882 and the supplemental agreement thereto of January 4th 1882 were executed long prior to the creation of the defendant and there is no evidence showing that the defendant ever adopted said agreement you will not consider the execution of said agreement or the contents of the same as in any wise affecting this defendant"

Whereas the said direction ought to have been given so that the jury might not convict the defendant of violation of the anti-trust laws of Texas on account of this agreement between other persons made long before the defendant came into existence and long before the passage of the said anti-trust laws And the verdict having been given for the State the defendant is by reason of the said refusal deprived of its property by the said judgment without due process of law contrary to the provisions of the said Constitution

20 There is also manifest error in this that the penalties of $1,549,500 and $74,400 assessed by the jury are respectively so plainly excessive that the defendant is thereby deprived of its property without due process of law

21 There is also manifest error in this that the Court upon hearing the said exceptions of the defendant to the said petition in manner aforesaid overruled others of the said exceptions (Nos. 28 and 38) whereby the defendant objected that the recovery of penalties under the said statutes respectively for acts done more than two years before the commencement of the said action was barred by article 219 of the Code of Criminal Procedure of Texas And in this that the Court also overruled in like manner others of the said exceptions (Nos. 30, 31, 40, 41) whereby the defendant objected respectively that if the said limitation was not available to it the defendant would be denied the equal protection of the laws contrary to the provisions of the said Constitution and that the said statutes of 1899 and 1903 would respectively be invalid by reason thereof And in this that the Court also in like manner overruled others of the said exceptions (Nos. 32 and 42) whereby the defendant objected that the recovery of the said penalties for acts done more than two years before the commencement of the said action was barred by article 3354 of the Revised Statutes of Texas And in this that the Court also in like manner overruled others of the said exceptions (Nos. 34 and 44) whereby the defendant objected that if the said limitation was not available to it the defendant was denied the equal protection of the laws contrary to the provisions of the said Constitution and that the said statutes of 1899 and 1903 were invalid respectively by reason thereof And in this that the Court also in like manner overruled others of the said exceptions (Nos. 35 and 37) whereby the defendant objected respectively that the recovery of penalties under the said statute of 1899 for acts done more than four years before the commencement of the said action was barred by article 3358 of the said Revised Statutes and that if the said limitation was not available to it the defendant was denied the equal protection of the laws contrary to the provisions of the said Constitution And in this that the judge also refused with like effect and consequences to direct the jury as requested by the defendant in the Special Charges refused Nos. 1, 2, and 3 respectively as regards the said limitations which were duly pleaded in the defendant's answer

22 There is also manifest error in this that the Court in like manner overruled another of the said exceptions (No. 10) to the said petition whereby the defendant objected that the parts thereof which seek to hold the defendant liable to penalties and a forfeiture of its said

permit because of the alleged agreement or understanding whereby in consideration of the defendant purchasing all its supplies from the said Standard Oil Company the said Standard Oil Company agreed that the defendant should be permitted to sell its products in Texas without competition or interference by the said Standard Oil Company because it appears from the petition that the said Standard Oil Company was and is a citizen of New Jersey and never obtained a permit to do business in Texas and it is not alleged that it ever contemplated entering Texas to do business therein or could have obtained a permit so to do and therefore an agreement such as alleged if made could not be construed as violating any laws of Texas without giving to such laws an extra-territorial effect and operation binding upon citizens of other states and with respect to inter-state commerce and in violation of the said Constitution and the defendant moved the Court to strike out the said allegations with respect to the said alleged agreement and understanding And the said exception being overruled the defendant is by the said judgment made liable to the penalties imposed by the said laws on account of the said alleged agreement or understanding contrary to the provisions of the said Constitution relating to commerce among the several states and is so deprived of its property without due process of law

23 There is also manifest error in this that the said judge at the trial refused to direct the jury as requested by the defendant (Special Charges refused No. 23) as follows

"You are instructed that if you believe from the evidence that the defendant has entered into any agreement by which it has bound itself to transact business within a certain territory in the United States, including the State of Texas, and that in pursuance of such agreement the defendant has been and is transacting business in the State of Texas, the making of such agreement and the transaction of business thereunder by the defendant cannot be considered as in violation of the Anti-Trust Laws of Texas, and in this connection you are instructed that the defendant always had and now has the right to confine its business operations to any territory desired by it and that the fact that the defendant has not extended its operations to a broader field would not render the defendant guilty of violating the Anti-trust Laws of Texas"

Whereas the said direction ought to have been given so that the jury might not convict the defendant of violation of the said laws by reason of any such agreement or understanding as alleged as aforesaid by which the said Standard Oil Company agreed that the defendant should be permitted to sell its products in Texas without competition or interference by the said Standard Oil Company in consideration of the defendant purchasing all its supplies from the said Standard Oil Company and which agreement or understanding related to com-

merce among the several states And the verdict having been given for the State the defendant is by the said judgment deprived of its property without due process on account of statutes passed by the State of Texas regulating commerce among the several states contrary to the provisions of the said Constitution in that behalf

24 There was also manifest error in this that the said judge at the said trial arbitrarily and without any regard to the rules of law and for the purpose of exciting and inflaming the prejudices of the jury against the defendant admitted in evidence against the objection of the defendant proof of the Standard Oil Trust agreement of 1882 in the plaintiff's petition set out which was made many years before the incorporation of the defendant and to which it was admitted that the defendant never became a party And in this that the said judge in like manner admitted in evidence the paragraphs (3rd 4th 5th 6th 7th and 8th) of the agreement of counsel called Stipulation No. 1 setting out subject to all legal objections that the Standard Oil Company of New Jersey owned a majority of the shares of the companies therein mentioned by the names of the Standard Oil Company of Indiana New York and Kentucky respectively and of the Continental Oil Company and the Republic Oil Company at the times and in the manner therein mentioned and that the said companies did not transact any business in Texas all of which were matters in which the defendant was in no way concerned and had no possible relation to any of the questions involved in this case And also in this that the said judge in like manner admitted in evidence that the defendant had given rebates and discounts to certain dealers and had sold oil at different prices in different localities in Texas which evidence was irrelevant to all the issues in the case And also in this that the said judge in like manner admitted in evidence the testimony of the witness C. W. Cahoon to the effect that at points in Texas where there was competition the defendant sometimes sold oils at less than at points where there was no competition which testimony had no tendency to show any violation of the laws of Texas and could have no effect except to prejudice the jury And also in this that the said judge in like manner admitted in evidence the testimony of the said C. W. Cahoon to the effect that for about 60 days in 1906 certain brands of oil of grades inferior to that known as Eupion oil had been sold by the defendant as Eupion oil which evidence was frivolous and irrelevant And also in this that the said judge in like manner admitted in evidence the testimony of the witness A. W. Clem to the effect that the old Waters-Pierce Company in 1891 cut the prices of oil at Seymour and other places in Texas and also that the old Waters-Pierce Company in 1894 after it bought out the business of the same witness advanced the selling-price of oil from 9½ cents to 22 cents per gallon which testimony did not relate in any way to the defendant or its

doings or to any issue involved in this case And in this that the said judge in like manner admitted in evidence the testimony of the witness Royer Campbell to the effect that in 1894 when he quit buying from the old Waters-Pierce Company and bought from other persons in San Antonio the old Waters-Pierce Company immediately cut the price of oil from 16 or 17 cents to 8 and 10 cents per gallon and also his testimony as to the character of warfare and competition that the old Waters-Pierce Company carried on with him in 1894 which evidence did not relate in any way to the defendant or anything in question in this case And the said judge permitted the jury to consider all the said evidence so admitted so far as it might seem to establish any of the said issues submitted for their consideration And by the admission of the said several pieces of evidence respectively the prejudices of the jury were excited and inflamed against the defendant and their attention was diverted from the true issues in the case and the defendant was prevented from having a trial of the said issues according to the due course of law And by the judgment upon the verdict upon the issues submitted to the jury as aforesaid the defendant is deprived of its property without due process of law contrary to the provision of the said Constitution

25 There is also manifest error in this that the Court appointed a receiver of the property and assets of the defendant and the bond of such receiver was received and approved as appears by the said record after the judgment given upon the said verdict was suspended by the proceedings by way of appeal on the part of the defendant from the said judgment although the Court had no authority to appoint such receiver otherwise than as a consequence of the said judgment and for the purpose of carrying the same into effect And the defendant was thereby deprived of its property without due process of law contrary to the provisions of the said Constitution

26 There is also manifest error in this that after the judgment given upon the said verdict and after notice of appeal therefrom by the defendant according to law the Court acting under color of the Texas statute of 1907 c. 87 but arbitrarily and wilfully disregarding its provisions and purposes appointed the said receiver for the purpose of depriving the defendant of its property and business and not for any purpose for which the appointment of a receiver was authorised by the said statute and on the alleged ground that the said judgment had been rendered against the defendant for violation of the said anti-trust laws and that newspaper interviews with the counsel for the defendant had been brought to the attention of the Court in which the said counsel had declared the purpose of the defendant to appeal from the said judgment and to continue to carry on its

business in the same manner as theretofore and without any evidence being submitted to the Court in connection with the application for the appointment of such receiver And the Court disregarding the provisions of the said statute and the due course of law made the said appointment of a receiver not because any interest of the state seemed to require such action but for the pretended purpose of preventing the defendant from a continued violation of the law although the Court knew that the defendant had appealed from the said judgment and denied any violation on its part of the said anti-trust laws and although the Court assumed as declared by the Court at the time of such appointment that the defendant would file its proper supersedeas bond upon the said appeal and had a right to do so within the time provided by law all of which appears by the bill of exceptions of the defendant as to matters connected with the appointment of the receiver which bill of exceptions was signed and allowed by the judge who held the said Court at the time of the said proceedings And the defendant by the appointment of the said receiver for such purpose and in such circumstances is deprived of its property without due process of law contrary to the provisions of the said Constitution

27 There is also manifest error in this that the Court decided that the said statute of 1907 under color of which the said receiver was so appointed was valid and not repugnant to the said Constitution although the statute was passed after the commencement of the said action and provided that when any law of the said state including any of the said Anti-Trust Laws for the violation of which fines or penalties or forfeitures were provided had been theretofore violated or should be violated before the taking effect of the said statute by any corporation the said state should have a lien to secure the payment of such fine penalties and costs from the time when the said statute took effect on all property of such corporation within the said state or which should thereafter become or be brought within the said state and also provided for the appointment of a receiver for such corporation in the cases therein mentioned but did not provide for any lien or authorise the appointment of a receiver in the case of a violation of any of the said laws by any person other than a corporation Whereas it ought to have been decided that the said statute was invalid and repugnant to the provisions of the said Constitution forbidding the passage of any ex post facto law by any state and was also invalid because the defendant was thereby denied the equal protection of the laws and deprived of its property without due process of law contrary to the provisions of the said Constitution

28 There is also manifest error in this that after judgment was

improperly given upon the said verdict as aforesaid for the plaintiff the court appointed a receiver of the property and assets of the defendant the Waters-Pierce Oil Company as specified in the orders appointing a receiver whereas the Court ought not to have appointed such receiver And by the appointment of such receiver the defendant is deprived of its property without due process of law contrary to the provisions of the said Constitution

And the said Waters-Pierce Oil Company prays that the said judgment and order and the judgment affirming the same respectively for the errors aforesaid and others in the record and proceedings aforesaid may be reversed annulled and altogether held for nothing and that it may be restored to all things which it hath lost by occasion of the said judgment and order and the affirmance thereof as aforesaid

Questions in the Case

1. By the proceedings in the Texas courts the defendant has been subjected to the penalties of the Act of 1899, under paragraph VII of the judge's charge, by reason of an *agreement* made by another company, the old Waters-Pierce Co., with the Standard Oil Co., confining the business of those two companies to different parts of the United States. This agreement was made in 1878, many years *before the act was passed*, and the only ground for imputing it to the defendant is that the defendant has since acquired the business of the old Waters-Pierce Co. and carried it on in Texas and the other parts of the country where it was already established, and not in other places, though it has done so without entering into any similar agreement. The defendant submits that it cannot be so subjected to penalties without giving a retroactive effect to the act and depriving the defendant of its property without due process of law.

2. The agreement was not only made before the act of 1899 was passed, but it was made *outside of the state of Texas*, and it did not provide that either company should do anything in Texas, much less anything that has since been made illegal by the laws of that state. By imposing penalties on the defendant by reason of such an agreement, it is submitted that the State is punishing an act done out of its jurisdiction and so depriving the defendant of its property without due process of law.

3. The only provision of the agreement that affected Texas was that the Standard Oil Co. should not do business in that state, which it could not do without carrying its oil into that state for the purpose and thereby engaging in *interstate commerce*. The State had no authority to regulate such commerce by imposing penalties for entering into contracts relating to it.

4. The defendant has also been subjected to the penalties of the act of 1899 *for the doings of the Standard Oil Co.* in acquiring shares in the defendant company, in which the defendant itself had no part. This has been done under paragraph VIII of the charge on the assumption that the defendant thereby *permitted* a combination of its capital with that of the Standard Oil Co., although there was no evidence that the defendant itself had any part in the transaction except to register the transfer as it was bound to do. It is submitted that such an imposition of penalties upon the defendant for the acts of somebody else is a taking of its property without due process of law.

5. This acquisition of the shares also took place *outside of Texas* and under the laws of Missouri, and was a matter to which the State of Texas could not constitutionally extend its jurisdiction.

6. Besides this, any *combination* effected by the acquisition of shares by the Standard Oil Co. was effected when that company first acquired the shares in the

old Waters-Pierce Co. and that was long *before the act of* 1899 *was passed*. The shares in the defendant company were given to the Standard Oil Co. for its interest in the property of the old company which was taken over by the defendant, and there was no new combination effected at that time. The imposition of penalties on this ground therefore gives the act the effect of an ex post facto law.

7. In like manner the defendant has been subjected to the penalties of the act of 1903 for what *the Standard Oil Co.* did in acquiring the shares. This has been done under paragraph IX of the charge on the ground that *the defendant* thereby entered into a combination of its capital with that of the Standard Oil Co., and under paragraph X on the ground that the management of the two companies were thereby placed under the same management or control, and under paragraph XI on the ground that the Standard Oil Co. had acquired the shares with the purpose on the part of its own officers of lessening competition in Texas. It is submitted that the constitutional rights of the defendant have been violated in the three ways previously mentioned (4–6), by imposing penalties on the defendant for the acts of somebody else, for acts done outside of Texas, and for acts done before the statute.

8. It is also submitted that both the acts of 1899 and 1903 are too indefinite and uncertain in their terms to make it an offence to do what the defendant has been found by the jury to have done, and that the imposition of penalties for doing that deprives the defendant of its property without due process of law.

9. The penalties that have been imposed upon the defendant are also so excessive as to constitute a deprivation of its property without due process of law.

10. It is also submitted that the conduct of the judge at the trial in arbitrarily and without any regard to the rules of law admitting against the defendant's objection evidence that could have no possible connection with the issues in the case and could only confuse and excite the prejudice of the jury, and directing the jury to consider such evidence as tending to prove some of the issues in favor of the State, and directing them to bring in a verdict for the State if they found facts of which there was no evidence whatever, amounted to a denial of a trial according to law, and that the judgment deprived the defendant of its property without due process of law.

11. The permit was a contract with the State for valuable consideration under which the defendant was entitled to do business in Texas for ten years, and the revocation of the permit without convicting the defendant of misconduct by due process of law was, like the imposition of the penalties, a deprivation of its property without due process of law.

12. The order appointing the receiver, being dependent on the judgment, must fall with the judgment.

13. It is also submitted that, after the judgment for penalties had been superseded by the appeal and bond, the judge had no authority to complete the appointment of a receiver, and that the order completing such appointment deprived the defendant of its property without due process of law.

14. The appointment of the receiver was also made arbitrarily and without due process of law.

[The *Record* in No. 359 will hereinafter be referred to as the record, except where the other is specially mentioned.]

1. *Charging the Defendant with the Agreement made by the Old Waters-Pierce Co. before the Act of* 1899.

The only agreement upon which the defendant was charged was the agreement made by the *old* Waters-Pierce Co. in 1878 for a division of territory between it and the Standard Oil Co., and there was no evidence of any other.

The allegation in the petition (*Rec.* p. 6) is that, when the [old] Waters-Pierce Oil Co. was formed, it was agreed that that company was to confine its business to Texas and certain other places and was not to do or attempt to do business elsewhere, and that the Standard Oil Co. or its subsidiary or dependent companies should not do business in the territory named as that of the Waters-Pierce Oil Co., and that this agreement has been *acquiesced in* and *acted upon* by the defendant since its organisation to the present time. It is also alleged (p. 6) that, as a consideration of the agreement, the [old] Waters-Pierce Co. contracted to purchase all of its supplies from the Standard Oil Co., which contract was *enforced* and *observed* by the defendant since its incorporation to the present time.

It is alleged (p. 5) that the [old] Waters-Pierce Co. organised in 1878 *is in fact* the same company as the defendant "doing business under a reputed reorganisation with a charter dated May 29th 1900," and that "the company as reorganised *adopted* all the acts, *carried out* and *is carrying out* all the *contracts*, schemes, and conspiracies of the company as originally organised, and in every way has *taken the place* of the company as originally organised."

It is not alleged that the defendant ever *agreed* with anybody to adopt, observe, carry out, or to be bound by

this agreement of the old Waters-Pierce Co. or entered into any similar agreement with anybody. The defendant is charged only with *the original agreement* on the ground that it is in fact the same company as the old Waters-Pierce Co. and has acquiesced in, acted upon, enforced, observed, and carried out its agreements.

It is afterwards alleged (*Rec.* p. 37) that by the acts, doings, and undertakings thereinbefore set out the defendant had violated the act of 1899 and entered into and become a party to an agreement and understanding *to regulate and fix the price* of an article and commodity.

The defendant excepted to the allegations claiming penalties under the act of 1899 on account of this agreement, because it was made before the passage of the act, and, if the act authorised a recovery of penalties on account of the performance of the agreement by the defendant, it would violate the Constitution in being retroactive and impairing the obligation of contracts and denying to the defendant the equal protection of the laws and taking the property of the defendant without due process of law (*ante* p. 14, special exception 20; *Rec.* p. 53).

This exception was overruled (*Rec.* p. 97), to which the defendant excepted (p. 97) and assigned the same as error (p. 354, par. 25).

This was assigned also as error in this Court (*ante* p. 59, par. 5; *Rec.* p. 1190).

If the exception had been sustained as to the agreement alleged in the petition, it would have removed from the case the charge of an agreement for a division of territory, and there would have been no ground for leaving to the jury the issue stated in par. VII of the charge (*ante* p. 44; *Rec.* p. 288) regarding an agreement or understanding to fix or regulate prices.

See *Johnasson* v. *Bonhote*, 2 Ch.D. p. 300–301.
Alford v. *Cochrane*, 7 Tex. 485.

The evidence at the trial did not go beyond the allegations, but on the contrary fell far short of them. The only evidence of the agreement was the testimony of *H. C. Pierce*, (*ante* p. 23) that, when he organised the first Waters-Pierce Co. in 1878, it was agreed between him and the Standard Oil Co. that the first Waters-Pierce Co. would confine its operations and transact its business within the certain territory in which Waters, Pierce, & Co. had transacted their business.

This evidence was objected to by the defendant on the ground that it related to transactions with the *old* Waters-Pierce Co. which had ceased to exist and was not a party to the suit (*Rec.* p. 443).

There was no evidence of the alleged agreement on the part of the Standard Oil Co. not to do business in Texas *or* of the alleged agreement that the *old* Waters-Pierce Co. *should buy its supplies* from the Standard Oil Co.

None of the other witnesses who were questioned on the subject knew anything about the agreement (*C. A. Pierce*, *ante* p. 34; *C. M. Adams*, *ante* p. 42).

There was not even any evidence that the defendant had ever asserted any rights under the agreement from the time of its incorporation in 1900. The disputes about the dividing lines in Missouri and Louisiana, testified to by *C. F. Hatfield* (*ante* p. 28), occurred in 1889 or before. *H. R. Knollenberg* spoke only of the time between 1893 and 1895 when he was salesman for the *old* Waters-Pierce Co. and was told not to go beyond certain limits (*ante* p. 32). *T. R. Hopkins*, who once sold outside of his territory between 1887 and 1903 and was told not to do so any more, does not say that this happened since May 1900 (*ante* p. 32).

Even the testimony of employees of the Standard Oil Co. or other companies regarding the orders given to them relate to a time before the defendant was incorporated. This is so as to what *E. M. Wilhoit* was *told* about orders from

the Panhandle country and the complaints of the *old* Waters-Pierce Co., when he was employed by the Standard Oil Co. at Wichita more than 7½ years before he gave his evidence (*ante* p. 28). *M. Maxon* says that after 1895 his territory came in contact with that of the [old] Waters-Pierce Co. in Illinois, and he was not permitted to sell oil beyond the line in Missouri or Illinois, but he does not say he had orders to that effect after the defendant was incorporated in 1900 (*ante* p. 29). *A. H. Gardner* who was employed at Denver up to 1892 (14 years before 1906) by a company that represented the Standard Oil Co. there, only says that he did not sell oil in any territory in which the [old] Waters-Pierce Co. sold (*ante* p. 29). *E. P. Pratt*, who was so employed at Des Moines till 1892 and afterwards at Kansas City, says they were instructed to confine their business to their own territory, but he does not speak of any instructions after 1900 (*ante* p. 30). *W. N. Davis* testifies only of a period ending in 1897, in which he did not permit his men to seek patronage in Waters-Pierce territory (*ante* p. 31–32). *W. A. Morgan* was once or twice reprimanded for going into Waters-Pierce territory during his employment from December 1898 to October 1900, but he does not say that happened after May 1900, when the defendant was incorporated (*ante* p. 32). *G. J. Steigerwald*, a manager of the Republic Oil Co. in 1901 to 1904, is the only one that testifies to anything that happened after the defendant was incorporated, and he only says that one station of his company at Springfield, Mo., in the territory of the Waters-Pierce Co. was closed, and speaks vaguely of an apparent change in the method of doing business after a year or more (*ante* p. 29).

But, although the defendant itself never had any agreement or understanding with any other company or person about the territory in which the business should be carried on, there is no question that the defendant did not

extend the business outside of the territory in which it was established when the defendant acquired it. This appears by the testimony of *H. C. Pierce* (*ante* p. 24–25) and of other witnesses.

Upon this evidence, the judge, in par. VII of his charge (*ante* p. 44), left to the jury the question, in the words of s. 1 of the act of 1899, whether the defendant entered into or *became a party* to an agreement or understanding with the Standard Oil Co. *to fix or regulate the price* of oil in Texas, and persisted in carrying it out there.

This was excepted to according to the statutory provision (*ante* p. 50), and assigned as error (*Rec.* p. 372, par. 232).

It was also assigned as error in this Court (*ante* p. 62, par. 9; *Rec.* p. 1193–1195).

The jury were thus invited to treat the agreement of the old Waters-Pierce Co. for a division of territory as an agreement to fix or regulate prices, and also to treat the defendant as liable on account of the agreement of the old Waters-Pierce Co. in the same manner as that company would have been.

The defendant did not by acquiring the business and property of the *old* Waters-Pierce Co. succeed to any of the liabilities of that company.

Armour v. *Bement's Sons*, 123 Fed. R. 56.

The State courts by imposing on the defendant a liability on account of an agreement made by the *old* Waters-Pierce Co. have undertaken to deprive the defendant of its property without due process of law.

Woodward v. *Central Vermont Ry. Co.*, 180 Mass. 599.
Davidson v. *New Orleans*, 96 U. S. p. 102.

If the defendant has done anything in violation of the laws of Texas, it is liable for the consequences independently of any agreement, but it cannot be made liable on the ground that the *old* Waters-Pierce Co. made an agreement which would be contrary to the laws of Texas if it were made after 1899.

But if the defendant is to be regarded as the *old* Waters-Pierce Co. in a new form and so *a party to* its contracts, which is the theory asserted in the petition, then the question is to be treated in the same manner as if the *old* Waters-Pierce Co. were sued for penalties for having entered into the agreement for a division of territory in 1878 and remaining a party to it on and after June 1, 1900 (Cf. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. p. 36, 39).

In 1878 there was no law in Texas forbidding such an agreement as that by which the old Waters-Pierce Co. agreed not to do business outside of Texas or other specified places, and the agreement was perfectly legal, whether it was one that the Standard Oil Co. could have enforced or not.

Mogul Steamship Co. v. *McGregor*, [1892] A. C. p. 39.

It was impossible for the State of Texas in 1899 to impose a penalty upon that company for having previously entered into such a contract, and any law enacted for that purpose would have been an ex post facto law and invalid.

Kring v. *Missouri*, 107 U. S. p. 228.

It is plain that the action is criminal in its nature, as the object is to inflict punishment (*post* p. 136).

Penalties could not be imposed on the ground that the agreement provided for doing something since made illegal, which the company continued to do. The agreement did not provide for doing anything. It provided only that the *old* Waters-Pierce Co. should *not* do business out of

Texas and certain other places and that the Standard Oil Co. should *not* do business within that territory.

The case therefore does not resemble *State* v. *Missouri, Kansas, & Texas Ry. Co.*, 99 Tex. 516, 527; 91 S. W. 214, where a contract by a railway company for giving exclusive facilities to an express company, which was made before and carried out after the act of 1903, was held to be a violation of that act.

The only thing *forbidden* by the act of 1899 was *entering into or becoming a party to* an agreement or understanding to regulate or fix prices, and it was provided that the parties to such an agreement should be deemed "guilty of a conspiracy to defraud, and to be subject to the penalties as provided by this act" (1899, c. 146, s. 1, *post* p. 213). The agreement limiting the territory in which business should be carried on was entered into by the old Waters-Pierce Co. before the act was passed. That agreement, although it was not an agreement to regulate or fix prices and only might affect them indirectly by preventing the possible competition of the Standard Oil Co., was the only ground for the finding of the jury that there was an agreement to fix or regulate prices. But no such agreement was made after the passage of the act.

The only thing that the old Waters-Pierce Co. or the defendant *did* after the passage of the act, as regards the issue in par. VII of the charge, was to do business in Texas, which was not a thing forbidden by the act. The carrying on of business in Texas was not even a thing that the *old* Waters-Pierce Co. agreed to do. There was nothing in the agreement of that company to which the words of the judge's charge, "persisted in *carrying same out in Texas*" were applicable.

It is evident that the judge intended to allow the jury to treat the two companies and their obligations as identical.

In par. V (*Rec.* p. 287) he tells the jury they may consider certain evidence, if they find that on June 1st 1900 "there was formed *or existed*" an agreement between the officers of the defendant and those of any of the other companies mentioned relating to the management of the defendant's business. This was only three days after the defendant was incorporated, and the intimation that there may have been an agreement *then existing*, which was not then entered into, naturally suggests an agreement previously entered into by the *old* Waters-Pierce Co.

The identification was facilitated by the admission of the evidence of the judgment revoking the permit of the old Waters-Pierce Co. in 1897 for violation of the anti-trust acts of 1889 and 1895, the affirmation of that judgment by this Court in 1900, and the subsequent formation of the defendant company and the issue of a permit to it to do business in Texas (*ante* p. 21).

This evidence relating to the old Waters-Pierce Co. was objected to by the defendant on the ground that it was entirely irrelevant to the case against the defendant (*Rec.* p. 438–439). The only color for its admission was the charge in the petition that the "*conspirators*" had gone through the *form* of dissolving the old company and creating a new corporation "for the purpose of *defrauding* the state of Texas and for the purpose of *fraudulently rendering ineffective* the judgments of the courts of the state of Texas and of the United States" (*ante* p. 7–8; *Rec.* p. 21). It did not have the remotest tendency to prove that the defendant had made any agreement with anybody, but it enabled the jury easily to identify the defendant with the old Waters-Pierce Co. as charged in the petition.

The judge helped on the result by his encouragement of the idea of *conspiracy*. There was a general allegation of conspiracy in the petition but there was no evidence what-

ever in support of it. The Standard Oil Trust agreement of 1882 was no more a conspiracy than any combination would be that was formed to acquire and to do all the business that it could. It was not an agreement to do any unlawful thing or to use unlawful means to carry out a lawful purpose. And, whatever the character of the agreement may be, it was an admitted fact that neither the *old* Waters-Pierce Co. nor H. C. Pierce ever signed or deposited shares under the agreement (*ante* p. 19–20) and that the trust was dissolved long before *the defendant* came into existence (*ante* p. 7, 20).

There was no evidence of fraud or impropriety in the dissolution of the old company or the formation of the new one, or in the purpose of these proceedings. The only evidence adduced by the plaintiff on the subject was the testimony of *H. C. Pierce* (*ante* p. 22), that, the licence of the old Waters-Pierce Co. having been revoked, he organised the new company in order that he should manage and control it free from any direction of the Standard Oil Co. and that the company should transact its business in strict accordance with the laws of every state. This testimony gives no support to the charge of fraudulent purpose. When the permit of the old company was revoked, it was perfectly proper, and in accordance with the laws of Texas, that the persons interested in the business should form a new company to carry it on free from the contracts and combinations by which the old company had broken the law.

The identification of the two companies and their obligations was also assisted by the judge's direction (par. XIII, *ante* p. 47) that the jury might consider, upon the issues submitted to them, the evidence that the defendant had given *rebates and discounts* in the course of its dealings and the evidence of its general course of dealings and

methods of *meeting competition*, although these things themselves were not a violation of law. But the evidence of rebates and discounts and of vigorous competition was confined almost entirely to the *old* Waters-Pierce Co. (Campbell, *ante* p. 37; Clem, *ante* p. 40; Cahoon, *ante* p. 41–42). This evidence of what the *old* Waters-Pierce Co. did is the only ground of the constantly repeated charge against *the defendant* of "unfair competition" (*ante* p. 13), and, with the judge's direction regarding it, the jury could hardly fail to treat the defendant as for all practical purposes the same company as the old Waters-Pierce Co. and a party to all its agreements.

It is evident that the defendant was only found to have become *a party to* the old agreement of 1878 by the circumstances in which the company was formed and succeeded to the business, and the ground on which it was held liable to penalties was that it *remained* a party and persisted in *carrying out* that agreement in Texas on and after June 1, 1900, as found by the jury in accordance with the judge's charge (*ante* p. 44; *Rec.* p. 288), and as alleged in the petition. The judge at the trial said, "Most of the evidence that has been admitted in this case has been admitted on that theory" (*Rec.* p. 648).*

The judge cannot be supposed to have intended to leave to the jury the question whether the defendant had itself agreed to be bound by the old agreement or had made a similar new agreement, for, in the first place, there was no evidence whatever of any such agreement by the defendant, nor any allegation of one, and the supposition could not be made without attributing to the judge an intention

* This was said in a discussion about the evidence of continuing the business of the Eagle Refining Co., the issue on which was afterwards withdrawn from the jury in par. XII of the charge (*Rec.* p. 291–292).

to leave to the jury an issue not raised by the pleadings or supported by any evidence.

Maguire v. *Tyler*, 8 Wall. 650, 665.
Neilson v. *Lagow*, 12 How. 98, 110.

In the next place, such a supposition would be contrary to the avowed theory on which most of the evidence was admitted.

Accordingly the defendant has been convicted of a conspiracy to defraud and subjected to penalties by reason of an agreement made by another company long before the act was passed, and without having done any thing in pursuance of the agreement.

Although the words of the act refer to the future, yet the state courts have given it the effect of applying to an agreement made before its passage, and the defendant has thereby been deprived of its constitutional right.

General Oil Co. v. *Crain*, 209 U. S. 211, 228.

2. ***The Making of the Agreement outside of the State of Texas.***

The agreement upon which the defendant has been found guilty under par. VII of the charge (*ante* p. 44) was also made outside of the state of Texas, and did not provide for doing anything in that state, and it is submitted that the State has therefore undertaken to punish without due process of law an act done beyond its jurisdiction.

The defendant specially set up and claimed in its answer (*ante* p. 16, par. 24; *Rec.* p. 86–87) that, if it ever entered

into any agreement or understanding as alleged (which was denied), the same was made *outside of the state of Texas*, and that the Anti-Trust Laws of 1899 and 1903 had no application thereto, and that the court was without jurisdiction of the same for the reason that the laws of Texas had no extra-territorial effect.

This was a distinct claim that the act of 1899 could not, consistently with due process of law, impose a penalty upon the defendant on account of such an agreement.

Schlemmer's Case, 205 U. S. p. 9, 11.
Kaukauna Water Co. v. *Green Bay Canal Co.*, 142 U. S. p. 270-271.
Willson v. *Blackbird Creek Co.*, 2 Pet. p. 250-251.

The judge gave partial effect to this claim with a qualification that destroyed its effect, by telling the jury in par. VI of his charge (*Rec.* p. 288) that no agreement made outside of the state would violate the anti-trust laws of Texas, *unless* such agreement was executed or attempted to be executed in Texas. He then proceeded in par. VII (*ante* p. 44; *Rec.* p. 288) to direct them that, if the defendant *persisted in carrying out* the agreement in Texas, they should return a verdict for the State.

This qualification added by the judge was met by the Special Charge No. 23 (requested by the defendant and refused), that the *transaction of business in Texas* by the defendant could not be considered as in violation of the anti-trust laws, and that the fact that the defendant had not extended its operations to a broader field would not render the defendant guilty of violating them (*Rec.* p. 310).

The par. VII of the charge and the refusal of this Special Charge No. 23 were excepted to according to the statutory provision (*ante* p. 50) and assigned as errors (*Rec.* p. 372, 377, par. 232, 267).

Both were assigned as errors in this Court (*ante* p. 62, 75, par. 9, 23; *Rec.* p. 1193, 1205).

The only manner in which the alleged agreement for a division of territory could affect the price of oil in Texas was by freeing the defendant from the possibility of the future competition of the Standard Oil Co. This might indirectly affect the price of oil in Texas, though it could hardly be said to regulate or fix the price there. But the agreement did not provide for the doing of anything by either party. Its terms were absolutely negative, namely, that the old Waters-Pierce Co. should *not* do business *out of Texas* and other specified places and that the Standard Oil Co. should *not* do business *within* that area. There was no agreement that the old Waters-Pierce Co. or the defendant *should* carry on business in Texas, and the defendant, in doing so, exercised a right entirely independent of the agreement. Accordingly the defendant cannot be said to have been *carrying out the agreement in Texas* merely by continuing to do business in that state.

The only obligation imposed by the agreement was *not* to carry on business in certain places out of Texas, and the mere *not doing* of that *out of Texas* cannot be treated as *an act done* in Texas in pursuance of the contract.

If such an agreement could operate as an agreement "to regulate or fix the price" of oil in Texas, as specified in the act of 1899, c. 146, s. 1 (*post* p. 213), the only way in which it could be shown to have been carried into effect there would be by showing that the price had been actually regulated or fixed by the agreement or in pursuance of it.

But there was not a particle of *evidence* of any such regulation of prices, and no *finding* by the jury that prices had been actually regulated, and no intimation was given to them by the judge that they should consider whether prices had been affected or not.

It is plain that what the judge meant in par. VII by "*persisted in carrying out*" the agreement in Texas (*Rec.* p. 288) was only carrying on business there, taken in connection with the evidence of the general course of business of the defendant, its methods of meeting competition, and the rebates and discounts it had given, which he told them in par. XIII of his charge (*ante* p. 47) that they might consider upon this issue as well as upon the others submitted to them.

The only evidence as to the way in which prices were fixed was that they were settled by the officers of the defendant, and were based on cost, freight, local conditions, and competition (C. A. Pierce, *ante* p. 34; Finlay, *ante* p. 35; Horn, *ante* p. 36; Johnson, *ante* p. 37; Campbell, *ante* p. 39; Cahoon, *ante* p. 41–42; Ackert, *ante* p. 43–44).

There was no suggestion that the agreement was made in Texas, and it was admitted that the Standard Oil Co. had never done business there (*ante* p. 20–21; *Rec.* p. 424–425).

By this means the defendant has been subjected to penalties for a conspiracy on account of an agreement made in another state although it has not been shown that anything that the law of Texas was intended to prevent was effected by means of it.

The Texas anti-trust act of 1899, c. 146, s. 1 (*post* p. 213) was passed on the 25th May 1899 and is a copy word for word of s. 1 of the Arkansas act of 1899, c. 41, called the "Rector Anti-Trust Act," which was passed on the 6th March of the same year (Ark. Statutes 1899, p. 50).

In *State* v. *Lancashire Ins. Co.*, 66 Ark. 466 (1899), the defendant, having joined a combination out of the state to regulate the premiums to be paid for insurance, and being sued for penalties under the act, answered that it was not a

member of a combination to regulate the premiums for insuring property *in Arkansas*. This answer was held sufficient, on the ground that the State could not punish an offence unless it was complete in the state, and, although the legislature might dictate the terms on which foreign corporations could do business in the state, the only act for which the penalty was imposed was described in general terms as entering into an agreement to regulate prices, and the general expressions must be confined to acts done within the jurisdiction, and accordingly did not apply to an agreement made out of the state, unless it was to fix prices in the state and so would be completed there.

This case is a direct authority that the State of Texas had no authority to punish the defendant for entering into an agreement out of the state to fix prices, unless prices within the state were thereby fixed (see also *O'Neil* v. *Vermont*, 144 U. S. p. 332, 341).

There is however this difference between the cases, that in the Arkansas case there was a direct agreement *to regulate prices*, as described in the statute, but in the present case the only agreement was that the *old* Waters-Pierce Co. *should not do business out of* Texas and some other places and that the Standard Oil Co. should not do business *in* Texas. The obvious purpose was not to fix or regulate prices in Texas, but to enable the old Waters-Pierce Co. to do all the business there that might otherwise have been divided between the two companies.

The agreement did not necessarily have any effect upon prices in Texas. Nobody can say that, if the agreement had not been made, the Standard Oil Co. would have considered it a good business enterprise to invade the territory where another company was already established, or that, if the Standard Oil Co. had established itself there, the two companies would have deemed it for their respective interests to enter into a competition of reducing prices,

instead of getting what business they could respectively at the actual prices.

This would be readily recognised in the case of two large department shops in New York and Boston respectively. The Jordan Marsh Co. has a large establishment of that kind in Boston and does not carry on its business in New York where J. Wanamaker has a similar establishment, and they confine themselves respectively to the places in which their business is established. This is done presumably without any agreement or understanding between them.

It is not likely that the agreement had even any effect in keeping the Standard Oil Co. out of Texas after the passage of the anti-trust acts, for that company, being in the Texas view the arch-trust itself, could not have engaged in business there if there had been no agreement. But unless the agreement did actually regulate or fix prices in Texas, no act was done in that state contrary to the statute.

Even if there had been a finding of the jury that the price of oil in Texas had been actually affected by the agreement, it is at least doubtful whether such an indirect result of the agreement could be considered as an act done by the defendant in Texas in violation of the statute. If two merchants in St. Louis, or Liverpool, agreed with one another that they would not send goods to Texas for sale, on account of the oppressive laws in force there, it can hardly be asserted that one of them who happened to be passing through the state could be punished on the ground that prices there had been increased by the removal of their competition with others. Or if it could be shown that the result of a combination of manufacturers in Europe had been to increase prices in Texas, it would be difficult to say that one of them had violated the law of Texas. The result would have been only the

remote consequence of something over which the State of Texas had no authority. It would have been so in the present case if it had been shown that prices in Texas had been affected by the agreement. The case would not have been one where the punishment is inflicted for the continuation of an act begun in another state or for the direct result of an act done there, as in *U. S.* v. *Thayer*, 209 U. S. 39, 44, and *In re Palliser*, 136 U. S. 257, 266.

In 1905, as appears by *Hartford Ins. Co.* v. *State*, 76 Ark. 303, the Arkansas act of 1899 above mentioned was repealed, and a new section 1 was enacted in the same words as the former, but adding, after the mention of agreements, combinations, &c., the words "whether made in this state or elsewhere," and, after the mention of the purpose to regulate prices, the words "in this state or elsewhere." This was done, as stated in the case, in pursuance of a demand in "the platform" of "the dominant party" in 1904, that a certain bill should be passed whereby all foreign corporations should be prevented from doing business in the state if they were members of a pool or trust whether to affect prices in Arkansas or not. It was held by a majority of the court, two judges out of five dissenting, that the additional words, taken in connection with the "history of the times," showed an intention to make it unlawful for a foreign corporation to do business in the state while it was a member of a combination to regulate prices anywhere. An insurance company was consequently held to be liable to penalties in the same circumstances in which the insurance company was held not to be liable under the act of 1899. Battle J. dissented on the ground that the words "transacting or conducting business" in the state were only *descriptio personae*, and not a part of the offence or conspiracy, which consisted only in entering into a combination to regulate prices (p. 314). Wood J. also dissented on similar grounds.

In the present case the words of the act are those of the previous Arkansas act of 1899 and there are no such words as those added to it in 1905, and no such "history of the times," and the state court has not attempted to put on the words of the Texas act of 1899 any such construction as the majority of the Arkansas court have put on the Arkansas act of 1905. The Court of Civil Appeals said in its judgment (*Rec.* p. 1161) that the evidence was sufficient to show that the defendant was a party to an agreement or understanding with the Standard Oil Co., one object of which was to create a monopoly and control the price of oil and prevent competition in its sale in Texas, and that to a large extent such object had been accomplished; that the defendant performed the agreement in Texas, and such performance within the state constituted violations of Texas laws and rendered the defendant amenable to such laws, although the agreement might not have been made in the state; that to a large extent the case rested upon *circumstantial evidence*, but the court could not say that the jury were not warranted in their conclusions from it. This shows plainly that the court did not suppose that the *mere doing of business* in the state, about which there was no dispute, was a violation of the act of 1899, if the defendant was a party to an agreement made out of the state. It was also necessary that the object should be to some extent accomplished by creating a monopoly and controlling the price and preventing competition in Texas.

3. *The Subject of the Agreement was Interstate Commerce.*

The defendant excepted to the parts of the petition claiming penalties and a forfeiture on account of the agreement, because the Standard Oil Co. had never entered Texas to do business there and the agreement could not violate the laws of Texas without giving them an extra-territorial effect and with respect to interstate commerce in violation of the Constitution (*ante* p. 14, special exception 10; *Rec.* p. 49–50).

This exception was overruled (*Rec.* p. 97), to which the defendant excepted (p. 97) and assigned the same as error (p. 353, par. 15).

It was also assigned as error in this Court (*ante* p. 74, par. 22; *Rec.* p. 1204).

The defendant also specially set up and claimed in its answer (*ante* p. 16, par. 24; *Rec.* p. 86) that, if it ever entered into any agreement or understanding as alleged (which was denied), the same was made with reference to commerce in oils between states other than Texas or between Texas and some other state, and that the anti-trust act of 1899, if applicable thereto, was in violation of the provision of the Constitution regarding commerce among the several states.

The paragraph VII of the judge's charge (*ante* p. 44), which is excepted to according to the statutory provisions (*ante* p. 50) and assigned as error below (*Rec.* p. 372, par. 232) and in this Court (*ante* p. 62, par. 9; *Rec.* p. 1193), is inconsistent with this claim, which is again asserted in the motion for a new trial (*Rec.* p. 316, par. 4) referring to this paragraph of the charge.

It was agreed at the trial that the Standard Oil Co. had never done any business in Texas (*Rec.* p. 424–425).

The agreement alleged to have been made in 1878 was that the old Waters-Pierce Co. would confine its business to Texas and certain other places and that the Standard Oil Co. should not sell oil in that territory (*ante* p. 5), and no evidence was given of any other agreement (*H. C. Pierce, ante* p. 23).

All the supplies of oil used by those companies in their business were obtained at places outside of Texas, and such oil as was sold in Texas was carried there from those places for that purpose, and it is only very recently that oil has been discovered in Texas which could be so employed (*H. C. Pierce, ante* p. 23–24, 26).

Accordingly it was necessary first to carry the oil to Texas before it could be sold there, and this was interstate commerce.

General Oil Co. v. *Crain*, 209 U. S. p. 228–229.

The old Waters-Pierce Co. could not sell any oil in Texas without engaging in interstate commerce for the purpose of obtaining the oil that it intended to sell. The Standard Oil Co. only undertook to abstain from engaging in interstate commerce by carrying its products to Texas for the purpose of sale there.

As the agreement related only to interstate commerce, so far as Texas was concerned, that State had no authority to interfere with it or to impose penalties on account of it.

Caldwell v. *North Carolina*, 187 U. S. 622.
Leisy v. *Hardin*, 135 U. S. 100, 119.
Rearick v. *Pennsylvania*, 203 U. S. 507.

4. ***Liability of the Defendant under the Act of 1899 for the Doings of the Standard Oil Co. in acquiring Shares.***

It was specially set up and claimed in the answer that, the defendant being a Missouri corporation, it was not within the constitutional powers of Texas to make the ownership of stock in such corporation acquired in Missouri by the Standard Oil Co. an offence, and that the imposition of penalties on the defendant under the acts of 1899 and 1903 on account of such ownership by the Standard Oil Co. would deprive the defendant of its property without due process of law contrary to the Constitution (*ante* p. 16, par 25, 26; *Rec.* p. 87–88).

The defendant also requested the Special Charges No. 5 and No. 9, which were refused and were in substance as follows,—

Special Charge No. 5 (*Rec.* p. 297–298), that, as the defendant was a Missouri corporation, the legality of the ownership of a majority of its stock by the Standard Oil Co. was not an issue in the case, and the Texas Anti-Trust Laws could not be violated by the mere ownership of a majority of the stock by the Standard Oil Co.

Special Charge No. 9 (*Rec.* p. 300), that it has not been a violation of the laws of Texas since May 31st 1900 for the Standard Oil Co. to own a part of the stock of the defendant and the jury would therefore disregard any evidence that had been introduced upon the subject.

The judge in par. VIII of his charge (*ante* p. 45) directed the jury to find for the State under the act of 1899 if they found that the defendant "had *brought about or permitted* any *combination* or union of its capital with the capital

of the Standard Oil Co." whereby the price of oil in Texas was sought to be or would be reasonably calculated to be fixed or regulated.

And in par. XI (*ante* p. 46) the judge gave them a definition of *combination*, in leaving to them certain issues under the act of 1903, viz. if "the *Standard Oil Co.* had . . . acquired a majority of the capital stock of the defendant corporation and *thereby effected a combination* of said two corporations."

These paragraphs of the charge and the refusal of the Special Charges No. 5 and No. 9 were excepted to according to the statutory provision (*ante* p. 50) and assigned as errors (*Rec.* p. 372, 374, 377, par. 233, 236, 249, 253).

They were assigned as errors in this Court (*ante* p. 64–73, par. 10, 14, 16, 18; *Rec.* p. 1195–1203).

The act of 1899 (*post* p. 214), in s. 2, declares a monopoly to be, among other things, "any *union or combination . . . of capital* . . . by or between persons, firms or corporations," whereby any one of the purposes or objects mentioned in the act is accomplished or sought to be accomplished, or whereby the results described are reasonably calculated to be produced, and such a monopoly is declared to be unlawful and against public policy, and all persons and corporations engaged therein shall be deemed guilty of a conspiracy to defraud and be subject to the penalties of the act. By s. 5 any person or corporation "violating any of the provisions of this act shall forfeit not less than $200 nor more than $5000 for every such offence," each day being a separate offence.

There was no evidence of any combination or union of the capital of the defendant with that of the Standard Oil Co. unless such a combination or union was effected by the *Standard Oil Co.* in acquiring a majority of the shares of

the defendant company. That was the *act of the Standard Oil Co.*, and the defendant took no part in it and had no control over it.

There is no ground for saying that the defendant "*brought about or permitted*" it. The evidence adduced by the plaintiff, which was the only evidence, was that the shares corresponded to the interest that the Standard Oil Co. had in the *old* Waters-Pierce Co. and were transferred to that company by H. C. Pierce in September 1900 in accordance with an understanding at the time of the organisation of the company; this transfer was made by an indorsement of the certificates in blank, and the shares continued to stand in the name of H. C. Pierce till June or July 1904; the Standard Oil Co. then had them transferred on the books into the name of M. M. Van Beuren (*H. C. Pierce, ante* p. 25, 22).

So from May 1900 to June or July 1904, when the transfer to Van Beuren was presented for registration, the defendant had nothing whatever to do with the Standard Oil Co. or Van Beuren as the owner of the shares or with H. C. Pierce's dealings with them.

When the transfer was then presented for registration, the defendant only performed its legal duty in registering the transfer and issuing new certificates for the shares,* and did not thereby become a party to the acquisition of the shares by the Standard Oil Co. or Van Beuren.

**Case* v. *Bank*, 100 U. S. 446.
Oliver v. *Bank of England*, [1902] 1 Ch. p. 615, 619, 629.
Lindley on Companies (6th ed.) 81.

The petition alleges that this was done "with the knowledge and sanction of the defendant" (*ante* p. 9; *Rec.* p. 25). But there was no evidence that the defendant had any connection with the transaction except in performing the ministerial act of registering the transfer. That was an act which it could not legally have refused to perform.

The defendant could not have prevented the transfer from H. C. Pierce to the Standard Oil Co. or its nominee, if it had desired to do so, and there was no duty imposed on it to prevent the transfer. Its "sanction" consisted wholly *in doing nothing* in circumstances where there was nothing that it ought to have done or could have done.

The jury were directed in par. VIII of the charge (*ante* p. 45) to find for the State, if the defendant "brought about *or* permitted" a combination. Under this direction they cannot be taken to have found more than that the defendant "*permitted*" the combination. The permission could have been nothing else than taking no action in a transaction between other persons. (See *Hobson* v. *Middleton*, 9 B. & C. p. 303).

The statute says nothing about *permitting* a combination. It provides in s. 2 (*post* p. 214) that a monopoly is a union or combination of capital of certain kinds, and one of the ways in which it may be effected is "by the purchase, *acquisition*, or control of shares," and by s. 5 any person or corporation "*violating* any of the provisions of this act" is liable to penalties, and by s. 7 any foreign corporation "which shall *violate* any of the provisions" shall forfeit its right to do business in the state.

The natural interpretation of the words is that the act is violated by the person or corporation that so purchases or *acquires* the shares. But, according to the effect given to them by the state courts, the corporation whose shares *are acquired* by another is liable to the penalties and forfeiture of its right to do business.

This is nothing less than taking the property of one corporation to pay the penalties for the acts of another.

A statute that produces such an effect does not differ in principle from one that assumes to provide that the

property of A shall be the property of B, which has been used as an example of a statute that would deprive a person of his property without due process of law.

Davidson v. *New Orleans*, 96 U. S. p. 102.

In the *Northern Securities Co.'s Case*, 193 U. S. 197, it was held that the acquisition of a majority of the shares of the Northern Pacific and Great Northern Ry. Cos. by another company, which had been formed for the purpose, was a violation of the Sherman Act of 1890. That would have made the Northern Securities Co. also liable to the penalty of $5000 imposed (p. 318) for a violation of the act. But it is inconceivable that the Northern Pacific and Great Northern Ry. Cos. were each of them subject to a like penalty on the ground that *they* also had violated the law by what the Northern Securities Co. had done.

There was no ground for the judge to leave to the jury the issues specified in par. VIII of his charge, and he ought to have given the Special Charges No. 5 and No. 9 requested by the defendant, so that the jury should not find the defendant guilty of the acts done by the Standard Oil Co. in acquiring or continuing to own the shares, which the defendant had in its answer claimed that it could not be made liable for consistently with the Constitution.

If there had been any evidence that the defendant had taken any part in the combination, these special charges would have prevented the jury from putting their finding on the ground that the Standard Oil Co. had acquired or continued to own the shares.

But the judge plainly intended that the jury should find that *the defendant* had brought about or permitted a combination on the undisputed evidence alone that the Standard Oil Co. owned a majority of the shares. This is

shown by the definition he gave of *combination* in par. XI (*ante* p. 46) already quoted, viz., if "the *Standard Oil Co.* had . . . acquired a majority of the capital stock of the defendant corporation and *thereby effected a combination* of said two corporations." This definition was a general one, and not limited to the purposes of the particular issues in par. XI, and the jury would have been stupid if they had not so understood it.

In the Court of Civil Appeals, one of the judges, referring to this par. XI, thought that the provisions of the act of 1903 seemed to be directed rather against the corporation that acquired the stock of another, than against the corporation whose stock was acquired, but he said that the other members of the court did not concur with him (*Rec.* p. 1152). They did not however consider the effect of the definition upon the issues submitted in the other paragraphs of the charge, or give any reasons for their conclusion, which they announced in general terms, that there was no error in the charge (*Rec.* p. 1151–1152).

5. *The Shares acquired outside of Texas.*

The same parts of the answer and of the charge and Special Charges (above-mentioned under 4, *ante* p. 103) also raise the question whether the defendant can be subjected to penalties, consistently with due process of law, for a combination effected *outside of the state of Texas* by the ownership of the shares by the Standard Oil Co.

The defendant is a Missouri corporation and the Stan-

dard Oil Co. is a New Jersey corporation, and there is no suggestion that the transaction regarding the shares took place in Texas.

The provisions of s. 2 of the act of 1899 regarding combinations are general and the language is broad enough to include all combinations of the descriptions mentioned wherever they are effected. But the power of the State of Texas to punish for forming combinations is limited to combinations that are formed in the state or whereby something is done in the state.

See *State* v. *Lancashire Ins. Co.*, 66 Ark. 466; *ante* p. 96.

The only limitation in the statute is contained in the words describing the effect of the combination that is declared to be a monopoly (*post* p. 214). These words are,

"whereby any one of the purposes or objects mentioned in this act is accomplished
"or *sought to be* accomplished,
"or whereby any one or more of said purposes are *promoted*
"or *attempted to be* executed or carried out,
"or whereby the several results described herein are *reasonably calculated* to be produced."

The purposes and objects, and results, referred to are specified in s. 1 of the act (*post* p. 213), viz. *to regulate or fix* the price of any article, or *to maintain* the price when so regulated or fixed, or to fix or limit the quantity of any article.

There is no express mention of the state of Texas in either section, but, as the authority of the State does not extend beyond its boundaries, the words of the act must be limited by implication to what is done in the state, or the act will have to be treated as ineffectual as to what is done out of the state.

The judge, in par. VIII of his charge (*ante* p. 45; *Rec.*

p. 289), directed the jury to find for the State *on the issues submitted to them in that paragraph*, if they found that the defendant had brought about *or* permitted a combination of its capital with that of the Standard Oil Co. *whereby* the price of such oil in Texas

"was *sought to be* fixed or regulated,"

or "would be *reasonably calculated to be* fixed or regulated,

"*or* whereby the trade in such oil in Texas was *sought to be* controlled or limited."

It was not necessary for the jury to find more than *one* of those things in order to find for the State on the issues so submitted in par. VIII.

These issues submitted to them were, first, whether the defendant had brought about or permitted a *combination*, and, then, whether that combination answered any *one* of three *descriptions*. If there was a combination and it corresponded with one of those descriptions, the jury were directed to find for the State on the issues submitted to them in that paragraph. It was not necessary for the jury to find, and they did not find, that the combination answered all three of the descriptions.

Accordingly, in convicting the defendant under this direction, the jury cannot be taken to have done more than to find that the defendant *permitted* such a combination of capital to be effected (outside of the state of Texas) whereby the price of oil in Texas would be *reasonably calculated to be* fixed or regulated (although the price was not in fact fixed or regulated by it). Or the jury may have found only that, although the price was not actually fixed or regulated, that result was *sought to be* produced.

The judge did not tell them that they must also find that prices were actually fixed or regulated or that *anything* was done or accomplished *in the state*. It was suf-

ficient that that result was either *sought to be* produced *or* would be *reasonably calculated to be* produced. In either one of those cases they were to find for the State on the issues submitted in that paragraph of the charge, whether anything was actually done in Texas or not.

A form of verdict was prepared by the judge to be used if the jury found for the State on the issues submitted to them in one or more of the five paragraphs specified and not in all of them, and another form was prepared by him to be used in the case, which actually happened, that they found for the State on the issues submitted to them in all the five paragraphs (*Rec.* p. 292–293, par XV).

The defendant was a Missouri corporation, and it was not in the power of the State of Texas to determine who should hold shares in it, or to impose penalties upon it because shares were held by persons who might not have been allowed to hold them if it had been a Texas corporation. If the defendant and the Standard Oil Co. formed a combination out of Texas by which it was *sought to* regulate prices in Texas, nothing was done for which that State had a right to impose penalties, unless the purpose was accomplished by the actual regulating of prices there. If it was not *sought to* regulate prices, and the jury only thought that the combination would be *reasonably calculated* to fix or regulate them, that would not be a thing done in Texas for which that State had a right to impose penalties. In order that the State should have authority to do that, it was necessary that the combination should be *formed* there or that prices there should be *regulated* by means of the combination. The jury have not found that either of these things was done.

It is not sufficient that the defendant has been doing business in Texas. That is not an act against which the

statute was directed, and there has been no intimation by the state courts that the penalties could be imposed on that ground. The statute was directed against combinations by which prices there might be regulated or fixed, and competition driven out. If the defendant, after the Standard Oil Co. had acquired the shares, had withdrawn from business in Texas, that would have had a tendency, by removing its competition, to produce the very effect that the statute was intended to prevent. There would have been one less competitor in business there, and the other traders in the state would not have had that inducement to lower their prices.

The Special Charges No. 5 and No. 9 (*Rec.* p. 297–298, 300) requested by the defendant ought to have been given in accordance with the claim in the answer (par. 25, 26, *ante* p. 16) that the State of Texas could not consistently with due process of law impose penalties on the defendant on account of the ownership of shares acquired in Missouri by the Standard Oil Co. and the directions contained in par. VIII of the charge (*ante* p. 45), which are inconsistent with it, ought not to have been given.

By the course that has been pursued, the jury have been enabled to convict the defendant and impose penalties upon it on account of a combination formed outside of the state of Texas which has not been found to have regulated any prices in Texas or even to have had any effect upon them. As this is a matter in which the State of Texas has no authority, the defendant is by this means deprived of its property without due process of law.

6. *Combination effected before the Act of* 1899.

By par. VIII of the charge (*ante* p. 45) the jury were directed to find a violation of the act of 1899, if the defendant *had* on June 1, 1900, brought about or permitted a *combination* of its capital with that of the Standard Oil Co. whereby certain things were sought to be, or would be reasonably calculated to be, done.

This direction required the jury to convict the defendant if they found that there had been *a combination*, although it was formed before the passage of the act.

Although the particular shares in the defendant company that now belong to the Standard Oil Co. were transferred to that company after the act of 1899 was passed, yet the interest in the old Waters-Pierce Co. for which the shares were so given to it was acquired by the Standard Oil Trustees as far back as 1882, and was transferred to the Standard Oil Co. in 1892 for the same purposes as those for which it had been previously held by the trustees. It is submitted that any *combination of capital* that was effected by all or any of the transactions in the case, was effected in 1882 when that interest was so acquired, and not at the time when these shares were issued on account of it or when they were transferred to the Standard Oil Co. As the combination so effected was a perfectly lawful one and not subject to any penalty at that time, it was not competent for the state of Texas to impose penalties by the act of 1899.

The act in s. 2 (*post* p. 214) defines a monopoly as including, among other things, a *combination* or consolidation of capital by or between persons, firms, or corporations,

whereby some of the purposes mentioned were accomplished or sought to be accomplished or whereby the several results described would be reasonably calculated to be produced, and it was declared that a monopoly, as so defined, included not merely combinations between two or more persons, firms, or corporations acting for themselves, but included all aggregations of capital, whether *effected* by the ordinary methods of partnership or by actual union under the form of a corporation, or *by* the purchase, *acquisition*, or control *of shares*, or other corporate property, and all corporations or partnerships that *have been* or may be created by the consolidation of the separate capital of two or more firms or corporations are especially declared to constitute monopolies, if created for one or more of the purposes mentioned.

It was alleged in the petition that the [old] Waters-Pierce Co. entered into the trust agreement of the 2nd January 1882 (*ante* p. 5; *Rec.* p. 7). At the trial it was admitted that this was not true, but it was agreed that some of the shareholders, other than H. C. Pierce, transferred a majority of the shares to the Standard Oil Trustees who held them till 1892 (*ante* p. 6, 20). The petition also alleges that in 1892, upon the dissolution of the trust, the Standard Oil Co. took over these shares and afterwards performed the functions of the trustees up to the present time (*ante* p. 7).

The petition then proceeds to allege that, after the cancellation of the permit of the old Waters-Pierce Co. in 1900, the form of dissolving that company was gone through, and a new charter was taken out by the old stockholders, giving the same name, "and being in fact *the same corporation*" (*ante* p. 7–8); that the nominal capital under the new charter was paid by the cheque of H. C. Pierce for $400,000, and the company, which had at the time more than that amount in cash, paid $400,000 as a dividend to the share-

holders, which was afterwards used to reimburse H. C. Pierce for his advance; and that, in pursuance of an understanding that "the 2750 shares previously owned by the Standard Oil Co." should be transferred to it, H. C. Pierce transferred a corresponding number of shares under the new incorporation by an indorsement in blank and placed them under its control, but they remained on the books in the name of H. C. Pierce till June 1904 when they were transferred into the name of M. M. Van Beuren for the benefit of the Standard Oil Co. (*ante* p. 8–9).

The defendant in its answer, by special exception No. 20 (*ante* p. 14), if the petition was construed as alleging that the defendant was the same corporation as the old Waters-Pierce Co. (as it plainly did allege), excepted to the allegations claiming penalties under the act of 1899 on account of the ownership of the stock by the Standard Oil Co., because it appeared that the ownership existed before the passage of the act, and, if the act authorised a recovery on that account, it would violate the Constitution in being retroactive and depriving the defendant of its property without due process of law and otherwise.

This exception was overruled and the defendant excepted (*ante* p. 13), and the same was assigned as error below (*Rec.* 354, par. 25), and was also assigned as error in this Court (*ante* p. 59, par. 5; *Rec.* p. 1190).

A similar claim was specially set up in the answer (*ante* p. 17, par. 27), and the judge's charge in par. VIII is directly contrary to it. This paragraph of the charge was subject to the statutory exception (*ante* p. 50) and was assigned as error below (*Rec.* p. 372, par. 233), as well as in this Court (*ante* p. 64, par. 10; *Rec.* p. 1195).

The act does not purport to make the mere *acquisition of shares* an offence. It is the *combination of capital* that constitutes the offence, whether it is effected by acquisition

of shares or in some of the other ways mentioned. Such a combination may be effected by the acquisition of shares, as where one corporation acquires the shares of another engaged in the same business and is thereby enabled to conduct the business of that corporation as a part of its own. Or some persons or a corporation may, by acquiring the shares of two or more corporations engaged in the same business, be enabled to manage the affairs of all of them as a single enterprise and so effect a combination of capital. But the shares, or a majority of the shares, of a corporation may be acquired even by another corporation without effecting a combination. If the corporations are not engaged in the same kind of business and the one acquiring the shares does not already own the shares of another corporation that is engaged in the same business as the one whose shares are acquired, there is no such combination of capital. So, if a combination is effected, and shares are afterwards issued on account of an existing interest in it, the combination is not effected by the acquisition of the shares. If such a combination is effected at a time when it is lawful and there is no penalty imposed by law for forming it, a state has no power by a subsequent statute to impose a punishment for effecting the combination, although shares have been issued or transferred since the statute on account of a previously existing interest in the combination.

The old Waters-Pierce Co. was incorporated in 1878, and a majority of its shares was acquired by the Standard Oil Trustees in 1882. Whatever combination of capital was ever effected, was effected then, and there has never been any combination since. The shares so acquired by those trustees were transferred to the Standard Oil Co. in 1892, but that company took the shares in the same interest and for the same purposes as the trustees had held them, and there was no new combination then.

In 1882 there was no statute in Texas making such a combination unlawful or imposing penalties on account of it, or in any way relating to the subject. In 1889 and 1895 certain "anti-trust laws" were passed, imposing a penalty for any violation of the provisions, and providing that every foreign corporation violating any of the provisions should be denied the right and prohibited from doing business in the state. These statutes are printed in a foot-note to the case of *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. p. 29 n. Both of them contained the same discriminating provisions that were held in *Connolly* v. *Union Pipe Co.*, 184 U. S. 540, 554, 560, to render the statute in that case unconstitutional, and were therefore invalid, except so far as they authorised the revocation of the charter of a corporation of that state or the permit of a foreign corporation to do business in the state (*State* v. *Shippers Compress Co.*, 95 Tex. 603, 611; *National Cotton Oil Co.* v. *Texas*, 197 U. S. p. 131). The provisions of the act of 1889 were included in the Rev. Civ. Sts. 1895, art. 5313–5321, and the Penal Code 1895, art. 976–988, and they and the act of 1895 were repealed by 1903, c. 94, s. 17, 18 (*post* p. 224–225.)

The permit of the *old* Waters-Pierce Co. to do business in Texas was cancelled and the company restrained from doing business in that state, in accordance with the acts of 1889 and 1895, by proceedings in the state courts and in this Court in 1897–1900 (*ante* p. 21) by reason of its having entered into contracts with persons in Texas by which they agreed to buy oil only of that company or to sell its oil exclusively of other oil (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. p. 37, 39–40; 19 Tex. Civ. App. 1; 44 S. W. 936).

The permit was issued subject to the provisions of these acts, and the contract thereby entered into between the State and the company was consequently not impaired by its revocation in accordance with the acts. Subject to any such contract the State might have arbitrarily

required the company to withdraw from the state without depriving it of any right (*Security Ins. Co.* v. *Prewitt*, 202 U. S. 246, 249; *National Council of Mechanics* v. *State Council*, 203 U. S. 151, 163).

But no penalty could have been imposed on the company on account of those contracts, for the acts were invalid so far as they assumed to change existing rights by making the contracts unlawful or by imposing penalties.

After the act of 1899 was passed on the 25th May 1899, the *old* Waters-Pierce Co. could not have been subjected to the penalties of that act on account of a *combination effected by the acquisition of* a majority of its *shares* by the Standard Oil Co., for the only combination so effected was effected in 1882, when the shares were acquired by the Standard Oil Trustees. Even if the time when the shares were transferred by those trustees to the Standard Oil Co. for the same purposes as they were previously held is regarded as the time of the combination, the latest time, at which the combination can be said to have been effected, was 1892, which was seven years before the act imposing the penalties.

When the present Waters-Pierce Oil Co. was formed in 1900, no new combination of capital or trade or anything else was formed. The capital of the new company was the same as that of the old company and was advanced by H. C. Pierce in cash, for which he was reimbursed out of a dividend paid by the old company, and shares in the new company corresponding in number to those held by the Standard Oil Co. in the old company were transferred by H. C. Pierce in accordance with their direction. The property and business of the old company were taken over by the new company, which continued to carry on the business. All this was done in accordance with a previous understanding between the shareholders, H. C. Pierce and the Standard Oil Co.

This is the statement of the transaction as it appears in the petition (*ante* p. 8–9) and in the evidence (*H. C. Pierce, ante* p. 25). There is no suggestion in either the petition or the evidence that any combination was effected by this transaction. The whole burden of the petition is that no change was effected by it and that the new company was in all respects the same as the old one. The petition calls the transaction a reorganisation and it may properly be described by that term. The property and business and the interests in them were the same as before. The only substantial distinction between the new company and the old one was, that the new company was a different corporation from the old one, and was not affected by the judgment excluding the latter from Texas, and was not bound by any of the agreements that made the latter obnoxious to the laws of that state.

The petition describes the reorganisation as a *fraudulent* reorganisation (*Rec.* p. 24) and says that the purpose of it was to *defraud* the State and *fraudulently* render ineffective the judgments of the courts (*Rec.* p. 21, 24, 25). But the facts constituting the supposed fraud are not stated, and, in the absence of a statement of such facts, these expressions charging fraud are mere vituperation and have no effect (*Ambler* v. *Choteau*, 107 U. S. p. 591; *Wallingford* v. *Mutual Society*, 5 App. Cas. p. 697, 701, 709). It has already been pointed out that there was no *evidence* of fraud or impropriety in the transaction (*ante* p. 91).

In connection with the allegations that the reorganisation was fraudulent (*Rec.* p. 21–22), the petition alleges that the *old* Waters-Pierce Co. was not really dissolved in accordance with the laws of Missouri and sets out certain statutes, alleging that they were the only provisions for dissolving a corporation there (*Rec.* p. 22). This was denied by the answer, which mentions another statute

providing for the dissolution of corporations and alleges that the old Waters-Pierce Co. was dissolved accordingly on the 28th May 1900, and also that the State was precluded from questioning the dissolution by reason of a judgment, dated the 5th November 1900, in an action by the State against the old Waters-Pierce Co. for penalties, by which it was held that the old Waters-Pierce Co. had been dissolved (*Rec.* p. 85, 95). No evidence was adduced by the State in support of its allegations regarding the law of Missouri, and no question was submitted to the jury in respect of the dissolution (*ante* p. 8). As there is no question of the incorporation of the *new* company, to which the property and business were transferred, and against which this action is brought (*Rec.* p. 2), it is of no consequence whether the *old* company was ever dissolved or not.

But if the reorganisation had been in fact a *fraudulent* one, that would not change the time when the combination was in fact effected. It might be a reason for disregarding the reorganisation and looking at the transaction as if there had been no reorganisation at all. But it would not be a reason for saying that a combination was made at a time when in fact no combination was made.

It is submitted therefore that the jury, under the directions in par. VIII of the judge's charge and in accordance with the allegations of the petition, have convicted the defendant under the act of 1899 on account of a combination that was effected long before that act was passed, and that the act has thus been given a retroactive effect and the defendant is deprived of its property without due process of law (*Kring* v. *Missouri*, 107 U. S. p. 228.)

[NOTE] *The Verdict as affected by Error in any of the Issues under the Act of* 1899.

By their verdict "the jury find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties 1,549,500.00 dollars" (*Rec.* p. 314).

The issues submitted to them in respect of that period are contained in par. VII and VIII of the charge (*ante* p. 44–45), and, in accordance with the act of 1899, which was in force during that period, the judge directed them that, if they convicted the defendant of any violation of that act, they should specify the date or days for which it was so convicted, and should fix the penalties at not less than $200 or more than $5000 per day (par. XIV, *ante* p. 47).

As the jury have fixed a gross sum as the total penalties for all the violations of the act during the 1033 days of which they have convicted the defendant under the two paragraphs VII and VIII of the charge, and have not specified how much of that sum was fixed as the penalty for one violation, or how much for another, the whole of that part of the verdict must be set aside, if there has been any error in regard to any of the issues submitted to them in these two paragraphs.

The jury were not required to fix the same penalty for every violation of the law, and there is no ground for supposing that they did so. The only limit on their discretion was that the penalties must not be less than $200 or more than $5000 a day, and they have kept within that limit, as the average for the 1033 days would be $1500 a day.

7. *Liability for Combination under the Act of* 1903.

In like manner the defendant has been subjected to penalties under the act of 1903, for each of the days between April 1, 1903, and April 29, 1907, on account of the combination supposed to have been effected by the acquisition of the shares by the Standard Oil Co.

It is submitted that the defendant's constitutional rights have thereby been violated in the same way as they were violated under the act of 1899, by imposing penalties on the defendant (1st) for the acts of the Standard Oil Co., (2nd) for acts done outside of the state of Texas, and (3rd) for a combination effected before the statute was passed.

The penalties were fixed at $74,400 by the second part of the verdict by which the defendant was convicted on each of the issues submitted for each of the days above mentioned (*Rec.* p. 315; *ante* p. 47). These issues were submitted to them by par. IX, X, and XI of the charge (*ante* p. 45–46).

> By par IX, the jury were directed to find for the State on the issues submitted to them in that paragraph, if they found that the defendant "*entered into a combination*" of its capital with that of the Standard Oil Co. "for the purpose of creating in Texas, *or* which *tended to* create" or carry out in Texas restrictions in the free pursuit there of the business of selling oil, *or* to fix, maintain, or increase the price there, *or* to prevent or lessen competition in its sale there, and that the defendant *remained* or *was* a party to and acted under the combination on any date in the period from March 31, 1903, to April 29, 1907, and each day that it remained a party to and acted under such trust would be a separate violation of the law (*Rec.* p. 289; *ante* p. 45).

By par X, they were directed to find for the State on the issues submitted to them in that paragraph, if they found that "*the direction of the affairs* of the defendant" and those of the Standard Oil Co. "*were under the same management or control*" on any date in the same period, and were placed under such common management or control by their respectively authorised officers under such circumstances that the common management or control created *or tended to* create or carry out restrictions in the sale of oil in Texas, or to fix, maintain, or increase the price there, or to prevent or lessen the competition in its sale there, and, if the defendant entered into such a monopoly, each day during the period above-mentioned that it remained a party to such monopoly would constitute a separate violation of the law (*Rec.* p. 290; *ante* p. 45).

By par XI, they were directed to find for the State on the issues submitted to them in that paragraph, if they found that the *Standard Oil Co.* "*had* on March 31, 1903," or any subsequent date during the period "*acquired* a majority of the capital stock of the defendant corporation, and *thereby effected a combination* of said two corporations," and that this stock was acquired and combination effected "*with the purpose* and intention *on part of the* managing officers and directors of said *Standard Oil Co.*" of preventing or lessening the competition in the sale of oil in Texas, *or* that the effect of the said combination *tended* to affect or lessen such competition, and, if the defendant entered into such a monopoly, each day during the period above-mentioned that it remained a party to such monopoly constituted a separate violation of the law (*Rec.* p. 291; *ante* p. 46).

The issues submitted to the jury by par. IX of the charge are based upon s.1 of the act of 1903, which is set out in full in the Appendix (*post* p. 220–221).

Those submitted by par. X are founded upon s. 2, par. 1, (*post* p. 222).

Those submitted by par. XI derive their only support from s. 2, par. 2 (*post* p. 222).

As already mentioned (under **4**, *ante* p. 103), it was spe-

cially set up and claimed in the answer that, the defendant being a Missouri corporation, it was not within the constitutional powers of Texas to make the ownership of stock acquired in Missouri by the Standard Oil Co. an offence, and that the imposition of penalties under the acts of 1899 and 1903 on account of such ownership by the Standard Oil Co. would deprive the defendant of its property without due process of law contrary to the Constitution (*ante* p. 16, 17, par. 25, 26, 28; *Rec.* p. 87–89).

And the Special Charges No. 5 and No. 9 were refused, which were in substance as follows,—

Special Charge No. 5 (*Rec.* p. 297–298), that, as the defendant was a Missouri corporation, the legality of the ownership of a majority of its stock by the Standard Oil Co. was not an issue in the case, and the Texas Anti-Trust Laws could not be violated by the mere ownership of a majority of the stock by the Standard Oil Co.

Special Charge No. 9 (*Rec.* p. 300), that it has not been a violation of the laws of Texas since May 31st 1900 for the Standard Oil Co. to own a part of the stock of the defendant and the jury would therefore disregard any evidence that had been introduced upon the subject.

The defendant in its answer, by special exception No. 9, also excepted to the parts of the petition claiming penalties and cancellation of the permit under the act of 1903 on account of the ownership by the Standard Oil Co. of a majority of the stock of the defendant, because it was so owned long before the passage of the act, and the act, if given the effect of making that an offence on the part of the defendant, was *ex post facto* in its operation and would deprive the defendant of its property without due process of law contrary to the Constitution (*ante* p. 13–14, special exception 9; *Rec.* p. 49).

The defendant in its answer, by special exception No. 21, also excepted to the allegations claiming penalties under the act of 1903 on account of the alleged ownership of stock by the Standard Oil Co. or the alleged agreements, because it appeared that the ownership existed and agreements were made prior to the passage of the act, and, if the act authorised a recovery of penalties on account of the continuance of them, it would violate the Constitution in being retroactive, and impairing the obligation of contracts, and denying to the defendant the equal protection of the laws, and taking its property without due process of law (*ante* p. 14, special exception 21; *Rec.* p. 53–54).

The defendant also requested the Special Charges No. 7 and No. 24 (*Rec.* p. 299, 311), which were refused and were in substance, that, since the Standard Oil Co. acquired a majority of the stock of the defendant prior to the passage of the act of 1903, and since, the defendant being a Missouri corporation, such acquisition of the stock could not be inquired into by the Texas courts but must be treated as valid, the inhibition of the act of 1903 against any corporations acquiring the shares of another could have no application to the case.

The paragraphs IX, X, and XI of the judge's charge (*ante* p. 45–46) are contrary to the exceptions and claims in the answer, and these paragraphs and the refusal of the Special Charges No. 5, No. 9, No. 7, and No. 24 were excepted to according to the statutory provision (*ante* p. 50) and assigned as errors (*Rec.* p. 373–374, 377, par. 234–236, 249, 251, 253, 268).

They were assigned as errors in this Court (*ante* p. 65–73, par. 11–14, 16–18; *Rec.* p. 1196–1203).

The special exceptions 9 and 21 above-mentioned were overruled (*Rec.* p. 97) to which the defendant excepted

(p. 97) and assigned the same as error (p. 353, 354, par. 14, 26), and the same were also assigned as error in this Court (*ante* p. 58, 60, par. 4, 6; *Rec.* p. 1190, 1192).

The issues submitted to the jury in the three paragraphs IX, X, and XI (*ante* p. 45–46) depend for their support on the ownership of a majority of the shares in the defendant company by the Standard Oil Co., and, if that support is withdrawn, there was no case for the jury under any one of those paragraphs. Even if it could be said that there was other evidence that might have supported a verdict for the State, still there is no doubt that this ownership was an important part of the case against the defendant, and, if it had been eliminated from the case, the result would very probably have been different.

The issues in par. IX (*ante* p. 45), regarding the combination, are whether the defendant "*entered into* a combination of its capital with" that of the Standard Oil Co., and *remained* or *was a party to* and acted under the combination on or after March 31, 1903.

This does not differ in substance from the issue in par. VIII regarding the combination before that date, which was, whether the defendant had *brought about* or *permitted* the combination, and has already been considered under 4 (*ante* p. 103). Its form is taken from s. 1 of the act of 1903, which defines *a trust* as "*a combination of capital*, skill or acts by *two or more* persons, firms, *corporations*, or associations," for certain purposes (*post* p. 220).

There was no ground for a pretence that the defendant "*entered into*" a combination otherwise than through the act of the Standard Oil Co. in putting it into a combination with itself by the mere ownership of the shares. The fact that the defendant was thus *in* a combination was a sufficient ground for the jury to find that it *entered into* the combination. They could hardly help finding that, when they were told in par. XI that, if the Standard Oil Co. *had*

acquired a majority of the stock and *thereby* effected a combination, they would find for the State, and, if the defendant *entered into* such a monopoly, each day that it *remained a party* would be a separate violation of law (*ante* p. 46). In that paragraph the words "*entered into*" are plainly used (in the same manner as the words "became a party to") to describe the result of what was done by the Standard Oil Co. The words are evidently used in the same sense in par. IX, and there was no evidence of anything else to which they could have been applicable. Being thus a party to such combination, the defendant would remain a party and act under "such trust," every day that the Standard Oil Co. continued to own the shares and the defendant carried on business.

What has already been said (*ante* p. 105–108) regarding par. VIII is equally applicable to par. IX.

The directions in par X (*ante* p. 45) were adapted to s. 2, par. 1, of the act of 1903, which described *a monopoly* as *a combination* of two or more corporations, "where the *direction of the affairs* of two or more corporations is in any manner *brought under the same management or control*" in certain circumstances (*post* p. 222).

The issue submitted in this paragraph as to the direction of affairs was, whether "*the direction of the affairs* of the defendant corporation" and those of the Standard Oil Co. "were under the same management *or* control," and were placed there by their respectively authorised officers.

There is nothing to which this is applicable except the management or control which the Standard Oil Co. is supposed to have obtained by the ownership of a majority of the shares. The jury were told in par. XI in substance, that the acquisition of these shares effected a combination, and that the defendant, if it entered into such a combination, was liable for penalties as long as it remained a party. No definition of what would constitute *control* or *management* was given to the jury, and they were left

to interpret those expressions as they liked. There was nothing to which they could apply the words except the *combination*, which they were told was effected by the acquisition of the shares.

There was no evidence, and it was not pretended, that the directors or managers of the two companies were ever the same persons.

At the trial an attempt was made to show control by evidence that "since the organisation of the new company up to along in June of 1905, *with the exception of a period* during which Mr. J. D. Johnson was on the board, there has always been three members of the board of directors that were supposed to represent the Standard Oil interests" (C. M. Adams, *ante* p. 42; *Rec.* p. 847). But J. D. Johnson was a member of the board from the organisation of the company in May 1900 to the spring of 1904, when W. F. Taylor took his place, and Tinsley took the place of J. P. Gruet (*Rec.* p. 447, 845–846). The petition itself states that J. D. Johnson was one of the five directors from the commencement (*Rec.* p. 23), and that all the Standard Oil Co.'s shares stood in the name of H. C. Pierce till June 1904, except *two* shares which were held by "C. M. Adams and J. P. Gruet as the representatives of the Standard Oil Co.'s interest in the directorate" (*Rec.* p. 24). So it was only during the year from June 1904 to June 1905 that there was even a majority of the directors who could be "supposed to represent the Standard Oil interests." One of them was W. F. Taylor, a New York lawyer (*Rec.* p. 845), and there is no suggestion that he took any active part in the business or ever attended a meeting of the directors.

There is no evidence that the directors, even during the year when three of them were "supposed to represent the Standard Oil interests," acted under the *actual* management or control of the Standard Oil Co.'s officers or managers, or that they did not manage the business of the company independently. The only evidence in the case is

that they did manage it independently. Even Tinsley, during the year that he was at St. Louis, does not appear to have acted under the control of the managers of the Standard Oil Co., and his interference was confined to changes of employees and details of management, and making himself disagreeable to the other officers (H. C. Pierce, *ante* p. 25–26; A. M. Finlay, *ante* p. 35–36; C. M. Adams, *Rec.* 879–884).

There is no presumption that directors are the mere tools or servants of the holder of a majority of shares in whose interest they are elected, or that they do not act in good faith in the performance of their duty (*Peterson* v. *Chicago, Rock Island, & Pacific Ry. Co.*, 205 U. S. p. 391; *Brewer* v. *Boston Theatre*, 104 Mass. p. 388).

Much stress was laid on the admitted fact that the Standard Oil Co. was allowed to examine the accounts by its own auditors (H. C. Pierce, *ante* p. 26; agreement, *ante* p. 27, 44). But there is no reason why it should not have done so. All corporations give more or less information to their shareholders regarding the management and results of the business, and, in a case where there were only two shareholders, the natural and convenient way of imparting it was to leave the books and accounts open to the inspection of both. It would have been ridiculous for the minority shareholder, H. C. Pierce, who was the manager, to exclude the majority shareholder from direct access to the sources of information.

There was no other ground upon which the finding could rest, that the direction of the affairs of both companies was *under the same management or control*, except the ownership of the shares by the Standard Oil Co., by which *that* company *effected* the combination.

The only evidence that the affairs "were placed under such common management or control by their *respectively authorised officers*," was, as regards the defendant company, that H. C. Pierce, who was an officer of the company,

transferred the majority of the shares to the Standard Oil Co. in accordance with a previous understanding, and the transfer was registered on the books by the proper officers of the company (H. C. Pierce, *ante* p. 25, 22). These were acts of authorised officers of the company. But, as the beneficial interest in the shares in accordance with the previous understanding already belonged to the Standard Oil Co., H. C. Pierce was legally bound to transfer them, and the officers only performed their legal duty in registering the transfer (*ante* p. 105).

The foundation of the directions in par. XI (*ante* p. 46) is s. 2, par. 2, of the act of 1903, which describes a *monopoly* as *a combination* of two or more corporations, "where any corporation *acquires* the *shares* or certificates of stock" of another corporation for the purpose or in the circumstances specified (*post* p. 222).

The directions contained in this paragraph were, to convict the defendant if the *Standard Oil Co.* had acquired a majority of the capital stock of the defendant corporation, and thereby effected a combination of the two corporations, and this was done with the purpose and intention on the part of the managing officers and directors of the Standard Oil Co. of preventing or lessening competition in Texas, or the effect of the combination tended to affect or lessen such competition.

This puts the liability of the defendant entirely, and without any ambiguous phrase, on the acts of the Standard Oil Co. in acquiring the shares and the purpose and intention of its officers, without any intimation that concurrence on the part of the defendant was necessary.

The issues submitted to the jury in these three paragraphs were thus substantially the same. The only differences in them consisted in the variations of language employed to adapt them to the different clauses of the statute. They

all of them rested on the acquisition of the shares by the Standard Oil Co., without which there could have been no verdict on any of them in favor of the State.

The constitutional rights of the defendant were consequently violated by the issues submitted to the jury under the act of 1903 in paragraphs IX, X, and XI, in the same three ways in which they were violated by the issues submitted in par. VIII under the act of 1899.

(1st) Penalties have been imposed on the defendant for the *acts of the Standard Oil Co.* alone, and the property of the defendant is thus applied to discharge penalties incurred by another.

One of the judges in the Court of Civil Appeals could not bring himself to concur with the others in approving par. XI of the charge, which gave the statute the effect of imposing the penalties on the corporation whose stock or property was acquired by another, when the provision of the statute seemed to be directed against the corporation that acquired the stock or property (*Rec.* p. 1152). The same objection was applicable to par. IX and X of the charge, if they were regarded in connection with the evidence in the case, and the other directions given to the jury.

But, whatever may be the proper construction of the statute, the effect that has been given to it is to make the defendant liable to penalties for what the Standard Oil Co. has done. (See *General Oil Co.* v. *Crain*, 209 U. S. 211, 228.)

This point has already been discussed with reference to the act of 1899 (under **4**, *ante* p. 106–107).

(2nd) The defendant has also been subjected to penalties for acts done *outside of the state of Texas* and consequently beyond the jurisdiction of the State.

This point has also been considered (under **5**, *ante* p. 108) with reference to the act of 1899.

The jury have not found upon any of the issues submitted to them under the act of 1903 that anything was done in Texas or any effect produced there against which the act was directed.

By par. IX (*ante* p. 45) the jury were only required to find that the combination was one *for the purpose* of creating restrictions in Texas *or* which *tended* to create or carry out restrictions there *or* to fix, maintain, or increase the price of oil there, *or* to prevent or lessen competition in its sale there. The *purpose* need not have been accomplished in Texas, or the *tendency* need not have produced any effect there.

Under par. X (*ante* p. 45) it was only necessary that the common management or control created *or tended* to create or carry out restrictions in the sale of oil in Texas, *or* to fix, maintain, or increase the price of oil there, *or* to prevent or lessen competition in its sale there. There may have been a *tendency* to any of those things without producing any actual effect in Texas. Even if competition had been actually *prevented* or *lessened* there, by preventing the Standard Oil Co. from extending its business into Texas, that would not be a thing done there.

In par. XI (*ante* p. 46) the jury, after finding that the Standard Oil Co. had *acquired* a majority of the stock and thereby effected a combination of the two corporations, were only required to find the additional fact, that this was done *with the purpose and intention* on the part of the officers of the Standard Oil Co. of preventing or lessening competition in Texas, *or* that the effect of the combination *tended to* affect or lessen such competition. The *purpose and intention* must have existed at the time and place of the combination, and the offence according to this direction was complete there. If the jury went on the other branch of the direction and found that the combination *tended to* affect or lessen competition in Texas, they need not have found that the *tendency* produced any

effect there. And even if competition there were actually affected or lessened by the Standard Oil Co.'s *not going there*, that would not be a thing done in Texas and subject to punishment there.

As already pointed out with reference to par. VIII (*ante* p. 110), the jury were directed in par. IX, X, and XI to find in favor of the State on the issues submitted to them in each of those paragraphs, if they found that a combination was effected in the manner described and that the combination answered any *one* of the several descriptions. It was not necessary that the combination should correspond to *all* of the different descriptions.

(3rd) The penalties have been imposed on account of a combination effected *before the act of* 1903 was passed, and the act has so been given a retroactive effect and has deprived the defendant of its property without due process of law.

Kring v. *Missouri*, 107 U. S. p. 228.

It was stated in the petition that the 2750 shares were transferred to the Standard Oil Co. in accordance with a previous understanding that they should be so transferred immediately after the reorganisation (*ante* p. 9; *Rec.* p. 24). It was agreed at the trial that since about the 24th September 1900 the Standard Oil Co. had owned 2748 out of the total 4000 shares of the new Waters-Pierce Oil Co. (*ante* p. 20–21; *Rec.* p. 425). This was long before the passage of the act of 1903.

No combination whatever was formed when the shares were thus transferred to the Standard Oil Co., but they were issued and transferred to it on account of its existing interest in a combination that was formed as far back as 1882, when a majority of the shares of the *old* Waters-Pierce Co. were acquired by the Standard Oil Trustees, or at the latest in 1892, when these shares were transferred by those trustees to the Standard Oil Co. for the same pur-

poses for which the trustees had previously held them. This has already been explained under **6** (*ante* p. 113).

8. *Indefiniteness of the Acts of* 1899 *and* 1903.

The defendant in its answer (special exception 25, *ante* p. 14–15; *Rec.* 55–56) excepted to the petition on the ground that each of the acts of 1899 and 1903 was so *indefinite, vague, and uncertain* that it could not be ascertained from its language what acts fall within their prohibitions and constitute an offence, and therefore to subject the defendant to penalties and forfeiture of its permit would be taking its property without due process of law and denying to it the equal protection of the laws contrary to the Constitution.

The defendant in its answer also excepted to the petition (special exceptions 52 and 53, *ante* p. 15; *Rec.* p. 68), so far as it sought to recover penalties under each of those acts respectively, on the ground that the act was so *indefinitely framed* and of such doubtful construction that it could not be understood and by reason of its failure to designate an offence by the plain import of its words the infliction of the penalties prescribed would be the taking of property without due process of law contrary to the Constitution.

The defendant also specially set up and claimed in its answer (*ante* p. 17, par. 29; *Rec.* p. 89) that the act of 1899 was unconstitutional and void, because of its terms

and in the construction of its language as applied to the facts alleged in the petition it was so vague, indefinite, and uncertain in its meaning that it was impossible for the defendant, in advance of its construction and application to any state of facts by the verdict of a jury and the ruling of the court, to understand its meaning and legal effect, or to know what was lawful and permissible and what was unlawful, and that the same would, if the defendant was convicted, deprive the defendant of its property without due process of law contrary to the Constitution.

The defendant also specially set up in its answer and made a similar objection to the act of 1903 (*ante* p. 18, par. 32; *Rec.* p. 90–91).

The directions to the jury in submitting the issues to them in par. VII–XI of the charge were directly contrary to these exceptions and claims. These paragraphs of the charge were subject to the statutory exception (*ante* p. 50) and were assigned as errors below (*Rec.* p. 372–374) and in this Court (*ante* p. 63–69; *Rec.* p. 1193–1199).

The special exceptions, 25, 52, and 53, were overruled (*Rec.* p. 97), to which the defendant excepted (p. 97) and assigned the same as errors below (p. 355, 358, par. 30, 75, 76) and in this Court (*ante* p. 61–62, par. 7, 8; *Rec.* 1193).

The question whether the statutes were too indefinite and uncertain in the particulars involved in this case was also expressly passed upon by the Court of Civil Appeals and was "not regarded as tenable" (*Rec.* p. 1152, at foot).

Montana v. *Rice*, 204 U. S. 291, 299.
Sullivan v. *Texas*, 207 U. S. 416, 422.

This action is a proceeding by the government of Texas

to recover penalties for an offence that the defendant is charged with having committed, and, although it is in the form of a civil action, the object is to inflict punishment for the offence and the action is criminal in its nature.

Huntington v. *Attrill*, 146 U. S. p. 667–669.
Chaffee v. *U. S.*, 18 Wall. 516, 545.
U. S. v. *Shapleigh*, 54 Fed. R. 126, 129–134 (C. A.)
State v. *Waters-Pierce Oil Co.*, 67 S. W. 1057 (1902).

In *Tozer* v. *U. S.*, 52 Fed. R. 917, the plaintiff-in-error was convicted under s. 3 of the Interstate Commerce Act 1887 (24 Sts. 380) which makes it unlawful for a common carrier "to make or give any *undue or unreasonable* preference or advantage to any particular person," but the Court of Appeals held that the statute was too indefinite and uncertain to support a conviction. Brewer J. in delivering judgment said (p. 919),

> "But in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. In the case of *Railway Co.* v *Dey*, 35 Fed. R. 866, 876, I had occasion to discuss this matter, and I quote therefrom as follows:
>
> "'Now the contention of complainant is that the substance of these provisions is, that, if a railroad company charges an unreasonable rate, it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable rate. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it. In Dwar. St. 652, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke, that the acts of parliament ought to be plainly

and clearly, and not cunningly and darkly, penned, especially in legal matters." See also *U. S.* v. *Sharp*, Pet. C. C. 122; *The Enterprise*, 1 Paine 34; Bish. St. Cr. s. 41; Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows: "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows." There is very little difference between such a statute and one which would make it a criminal offence to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158.'"

In *Ex parte Jackson*, 45 Ark. 158, a statute by which it was made a misdemeanor to "commit any act injurious to the public health or public morals" was held to be unconstitutional and void for uncertainty. The court said (p. 164),

> "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncrasies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

In *Louisville & Nashville Rld. Co.* v. *Com.*, 99 Ky. 132; 35 S. W. 129, a statute providing that, if any railroad corporation should charge "more than *a just and reasonable* rate of toll or compensation," it should be guilty of extortion and subject to a penalty, was contrary as well to the Federal as to the State Constitution, because it prescribed no standard of what was just and reasonable. It is said in the judgment of the court (p. 136),

"That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' cannot be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offence has been committed, must also be conceded.

"The *criminality* of the carrier's act therefore depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

"That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it cannot be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offence. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

The court then refers (p. 137) to *Louisville & Nashville Rld. Co.* v. *Railroad Commission*, 19 Fed. R. 679, 691, in which a similar Tennessee statute was held by the U. S. Circuit Court (Baxter, Hammond, & Key, JJ.) to be unconstitutional, and to the *Railroad Commission Cases*, 116 U. S. p. 336, in which that statute was distinguished from the one under consideration in the latter case.

In *U. S.* v. *Brewer*, 139 U. S. 278, Blatchford J. said (p. 288) in delivering the judgment of the court,

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *U. S.* v. *Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakedly within the statute. *U. S.* v. *Lacher*, 134 U. S. 624, 628."

(1) The act of 1899 (*post* p. 213) provides in s. 1, that *any corporation*, or any partnership, or individual, or other association of persons, "who shall create, enter into, become a member of or a party to any pool, trust, *agreement*, combination, confederation, *or understanding* with any other corporation, partnership, individual or any other person or association of persons, *to regulate or fix the price* of any article," or to maintain the price when so regulated or fixed, or to fix or limit the amount of any article, or the price of insurance, "shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided in this act."

By s. 2, a monopoly is defined as "any *union or combination* or consolidation or affiliation of capital . . . by or between persons, firms or corporations . . . whereby any one of the purposes or objects mentioned in this act is accomplished or *sought to be* accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are *reasonably calculated to be* produced," and all persons and corporations engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to the penalties prescribed in the act.

Under s. 1 of this act, the judge left to the jury the question, in the words of that section, whether the defendant "entered into or became a party to *an agreement or*

understanding" with the Standard Oil Co. "*to fix or regulate the price* in Texas of oil refined from petroleum." This question was submitted to the jury in par. VII of the charge (*ante* p. 44; *Rec.* p. 288).

The only agreement alleged in the petition to have been made by either the *old* Waters-Pierce Co. or the defendant was an agreement by the old Waters-Pierce Co. *to confine its business to Texas* and certain other places and *not to do* or attempt to do *business elsewhere*, and by the Standard Oil Co. not to do business in the territory named as that of the Waters-Pierce Oil Co. (*ante* p. 5; *Rec.* p. 6). No agreement *to fix or regulate prices* is alleged, unless this agreement answers that description. And in the petition the plaintiff charges that "by the acts, doings and undertakings *hereinbefore set out* the Waters-Pierce Oil Co. has violated" the laws of Texas, and says that the defendant has especially violated the act of 1899, and created, entered into and became a member of and a party to a pool, trust, agreement, combination, confederation, and understanding *to regulate and fix the price* of an article and commodity (*Rec.* p. 37).

The only agreement of which there was any evidence was that testified to by H. C. Pierce, (*ante* p. 23), viz., that, when he organised the first Waters-Pierce Co. in 1878, it was agreed between him and the Standard Oil Co. that the first Waters-Pierce Co. would confine its operations and transact its business within the certain territory in which Waters, Pierce, & Co. had transacted their business.

Upon this allegation and this evidence of an agreement for a *division of territory* between the two companies, the defendant has been convicted of having been a party to an agreement *to fix or regulate the price* of oil.

The agreement limiting the territory in which each of the two companies might do business was not an agree-

ment *to fix or regulate prices* in the natural or ordinary sense of the words. Those words have never before been applied to such an agreement in any of the cases that have arisen under legislation of this kind. In previous cases, they have only been applied to agreements by which the parties actually agreed to regulate or fix prices among themselves, as in *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, 117; 72 S. W. 615 (Texas), and *State* v. *Lancashire Ins. Co.*, 66 Ark. 466, and *Hartford Ins. Co.* v. *State*, 76 Ark. 303. But this agreement neither fixed or regulated prices nor provided a means of fixing or regulating them, and that was not its purpose or intention.

It was possible that prices might be affected indirectly as a result of the agreement. But the only way in which this could happen would be by leaving the Waters-Pierce Co. free to conduct its business without the possible competition that might have arisen if the Standard Oil Co. had seen fit to extend its business into Texas and try to get away the trade of the Waters-Pierce Co. by reducing prices. Nobody can say that that would have happened if there had been no agreement. It is by no means certain that the Standard Oil Co. would have extended its business into a district where the Waters-Pierce Co. was already established, even if the laws of Texas permitted it to do so, or that, if it had done so, the two companies would have considered it for their respective advantage to compete with one another by reducing prices. It is quite as likely that they would have tried to get what business they could at the existing prices. The immediate purpose of the agreement was, not to fix or regulate prices, but to allow the Waters-Pierce Co. to have all the business that might otherwise have fallen to the two companies. The agreement did not even give the Waters-Pierce Co. the power to fix or regulate prices. It left them to be regulated by cost and competition, as prices are generally regulated in trade, and all the evi-

dence shows that that is the way in which they were in fact regulated (T. R. Hopkins, *ante* p. 33; S. K. Wheeler, *ante* p. 33; E. S. Horn, *ante* p. 36; S. Johnson, *ante* p. 37; R. Campbell, *ante* p. 37, 39; A. W. Clem, *ante* p. 40; C. W. Cahoon, *ante* p. 41, 42; C. P. Ackert, *ante* p. 43–44). The petition admitted that there was competition, and complained that the Waters-Pierce Co. had carried it to such an extent that it had been disadvantageous to the competitors of that company (*ante* p. 13; *Rec.* p. 34–35, 37).

The agreement therefore was not an agreement to fix or regulate prices, and the most that can be said of it is that it was one that a jury might think *reasonably calculated to affect* or *increase* prices by limiting the territory in which each of the companies might do business, and so keeping out a possible competitor.

The words of the statute do not include an agreement that does not *regulate or fix prices* but only *limits the territory* in which the parties shall carry on business. Nobody could by reading it be informed that it was intended to make the act of entering into such an agreement a criminal offence.

The statute does not in terms prohibit an agreement that may in the opinion of a jury be only *reasonably calculated to* affect or increase the price of an article of trade. But by the judgment for penalties under par. VII of the charge, the state courts have given it the effect of applying to such agreements as well as to those that directly regulate or fix the price.

The validity of the statute must therefore be determined as if it had been expressed in accordance with the effect that has so been given to it.

General Oil Co. v. *Crain*, 209 U. S. 211, 228.

It is submitted that a statute that makes it a criminal

offence and imposes penalties, if anyone enters into or becomes a party to an agreement that may be *reasonably calculated to* affect or increase the price of any article is so indefinite and uncertain that nobody can say in advance what might be found by a jury to constitute an offence.

It might depend, as was said in *Ex parte Jackson*, 45 Ark. p. 164, upon "the moral sentiment which might happen to prevail with the judge and jury after the act had been committed," whether any particular agreement would be considered to have such a tendency as to make it a criminal offence. It was undoubtedly so in the present case. In the state of public feeling that existed at Austin, as disclosed by the newspapers (*Rec.* p. 208, 211, 253), the letters of the attorney-general of the state (*Rec.* p. 219–226, 232–236), and the testimony of the witnesses on both sides on the motion for a change of venue, any agreement between the Waters-Pierce Oil Co. and the Standard Oil Co. would probably have been considered to be *calculated to* increase the price of oil. It was already settled in the public mind that the Waters-Pierce Oil Co. was "a trust," and even witnesses who thought the defendant could have "a fair and impartial trial" had made up their minds on that question (*e.g.*) *R. C. Burleson, Rec.* p. 165; *R. E. Lee, Rec.* p. 275–276). But if a similar agreement had been made between two other oil dealers, for example, between two persons now engaged in the business in Massachusetts, by which one of them was to be at liberty to trade in Texas, and the other agreed not to engage in business there, it is not at all likely that prices in Texas would be in the least degree affected by the agreement. It is not certain that even a jury at Austin would consider the agreement *calculated to* increase prices there. An agreement for the purchase of a very large quantity of a commodity by one dealer of another would be much more calculated to affect the price. So the criminality of the act would de-

pend, not on the nature or provisions of the agreement, but on the importance of the business carried on by the parties to it, or on a variety of circumstances, which might weigh with a jury, but the effect of which could not be determined by the parties beforehand.

Accordingly s. 1 of the act of 1899, as applied to the facts alleged in the petition and proved by the evidence at the trial, was too indefinite to constitute an offence, or to support the conviction under par. VII of the charge.

(2) Under s. 2 of this act the judge left to the jury in par. VIII of his charge (*ante* p. 45) the question whether the defendant had brought about or permitted a combination of its capital with that of the Standard Oil Co. *whereby* the price of such oil in Texas

"was sought to be fixed or regulated,

or "would be *reasonably calculated to* be fixed or regulated,

"or whereby the trade in such oil in Texas was sought to be controlled or limited."

The jury were directed that, if they found there was that combination of capital, and it answered *one* of those three descriptions, they should find for the State.

As the jury were not required to find that the combination answered more than one of the three descriptions, it cannot be said that they found more than that the defendant permitted a combination *whereby* the price of oil in Texas would be *reasonably calculated to* be fixed or regulated. This was explained *ante* p. 110.

By the judgment of the court upon that finding the defendant is subjected to penalties for only having permitted a combination whereby the price of oil would in the opinion of a jury be *reasonably calculated to* be fixed or regulated, and for nothing else, under that paragraph of the charge.

The part of s. 2 of the act that attempts to make this

a criminal offence, and to impose penalties on account of it, is subject to the same objection of indefiniteness that has already been considered.

(3) The act of 1903 (*post* p. 220) in s. 1 defines a trust as a *combination of capital*, skill, or acts by *two or more* persons, firms, *corporations* or associations for any of the following purposes, "1. To create or *which may tend to* create or carry out restrictions in trade or commerce or aids to commerce . . . or to create or carry out restrictions in the free pursuit of any business. 2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities. . . . 3. To prevent or lessen competition in the manufacture . . . sale or purchase of merchandise, produce or commodities." [The other provisions of s. 1 are immaterial.]

By s. 2, a monopoly is defined as "a *combination* or consolidation *of two or more corporations* when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or *where* such common management or control *tends to* create *a trust as defined* in the first section of this act.

"2. Where any corporation acquires the shares or certificates of stock . . . of any other corporation or corporations for the purpose of preventing or lessening, or *where* the effect of such acquisition *tends to* affect or lessen competition. . . ."

The provisions of s. 1 and of the 1st and 2nd paragraphs of s. 2 were the grounds of the issues submitted to the jury by par. IX, X, and XI respectively of the judge's charge (*ante* 45–46).

By each of these provisions, it is enough to make the

combination a trust or a monopoly, if it only *tends to* produce the specified effect.

By s. 1 the combination is *a trust* if it *tends to* create or carry out restrictions in trade or in the free pursuit of any business, &c.

By s. 2, par. 1, it is *a monopoly* if it *tends to* create a trust as defined in s. 1 [*i.e.* a combination that *tends to* create or carry out restrictions in trade or the free pursuit of any business, &c.].

By s. 2, par. 2, it is also a monopoly if it *tends to* affect or lessen competition.

By par. IX of his charge (*ante* p. 45) the judge left to the jury the question, under s. 1, whether the combination was for the purpose of creating

"or which *tended to create* in Texas, or carry out in Texas, restrictions in the free pursuit in this state of the business of selling oil,"

"*or* to fix, maintain, or increase the price of such oil in Texas,

"*or* to prevent or *lessen competition* in Texas in the sale of such oil."

By par. X (*ante* p. 45) the question was left to the jury, under s. 2, par. 1, whether the common management or control created

"or *tended to* create or carry out restrictions in the sale in Texas of oil,"

"*or* to fix, maintain, or *increase the price* in Texas of such oil,

"*or* to prevent or *lessen* in Texas the *competition* in the sale of such oil."

By par. XI (*ante* p. 46) the question was left to them, under s. 2, par. 2, whether the combination was effected with the purpose and intention on the part of the officers

of the Standard Oil Co. of preventing or lessening the competition in the sale in Texas of such oil,

"*or* that the effect of said combination . . . *tended to* affect or lessen the competition in the sale in Texas of such oil."

The jury cannot be taken to have found more, under any of these three paragraphs, than that the combination *tended to* effect some *one* of the results mentioned.

Everything that has been said about the indefiniteness of the act of 1899, in regard to combinations whereby prices would be *reasonably calculated to be* fixed or regulated, is applicable to these provisions of the act of 1903 regarding combinations which *may tend to* create or carry out restrictions in trade or to affect or lessen competition, &c.

It could not have been intended to forbid all combinations, for in that case there would have been no reason for limiting the provisions to those formed for certain purposes, or which tend to produce the results mentioned, although it might not be the purpose of the combination to produce them. But almost every combination of persons or corporations engaged in trade would have a *tendency* to affect prices or trade in some way.

The provisions of s. 1 apply to persons, as well as corporations, and a partnership is a combination of persons. The words of the act of 1899, s. 2, expressly mention *partnerships*. A partnership might be formed without any purpose of creating restrictions in trade or increasing or reducing prices, but it might have *a tendency* to produce one of those results, and then it would be within the terms of the act. There is no standard provided by which the bad combinations can be distinguished from the good ones, until a jury has expressed its approval or disapproval according to the prevailing sentiment at the time.

The statutory provisions upon which the cases of *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 42, 43, and *National Cotton Oil Co.* v. *Texas*, 197 U. S. 115, were decided, were not those upon which the defendant has been convicted in the present case, and different considerations apply to them.

It is submitted that the defendant's special exceptions in its answer ought to have been sustained as to the indefinite parts of the statutes of 1899 and 1903, as applied to the case set out in the petition, and that the jury ought not to have been allowed at the trial to find a verdict against the defendant on those indefinite parts of the statutes contrary to the claims specially set up in the answer.

9. *The Excessive Penalties.*

It is also submitted that the penalties imposed upon the defendant for the offence of which it has been convicted are so excessive as to constitute a deprivation of its property without due process of law.

This objection is assigned as error in this Court (*ante* p. 74, par. 20; *Rec.* p. 1203).

It was raised in the courts below by the motion for a new trial (*Rec.* p. 318, par. 12, 14) and was assigned there as error (*Rec.* p. 381, par. 281, 283), and it is therefore properly before this Court.

Chicago, Burlington, & Quincy Rld. Co. v. *Chicago*, 166 U. S. p. 231.

Schlemmer's Case, 205 U. S. p. 9.

The point was also expressly passed upon by the Court of Civil Appeals in reviewing the refusal of the motion for a new trial, as appears by the opinion of that court printed in the *Record* p. 1160–1161

Montana v. *Rice*, 204 U. S. 291, 299.
Sullivan v. *Texas*, 207 U. S. 416, 422.

The part of the opinion of the Court of Civil Appeals that relates to this subject is as follows (*Rec.* p. 1160),

> "It is claimed that the trial court should have granted appellant's motion for a new trial based upon the ground that the judgment imposes excessive fines, and operates as a deprivation of property without due process of law. It is also contended that the act of 1899 should be declared void, because it authorises excessive fines and forfeitures. That question has already been decided against appellant's contention in *State* v. *Laredo Ice Co.*, 96 Tex. 467. The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence we have reached the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives."

In *State* v. *Laredo Ice Co.* 96 Tex. 461, 467, the question was, not whether a judgment imposed an excessive fine, but whether the statute was wholly unconstitutional because it authorised the imposition of excessive penalties. The case came before the court upon demurrer, which had been sustained by the lower court on the ground that the act was unconstitutional. The Supreme Court of the state said (p. 467–468),

> "Prescribing fines and other punishments which may be imposed upon violators of the law is a matter peculiarly within the power and discretion of the legislature, and courts have no right to control or restrain that discretion except in extraordinary cases where it becomes so manifestly violative of the con-

stitutional inhibition as to shock the sense of mankind. 13 Am. and Eng. Enc. of Law, 60; *Express Co.* v. *Walker*, 92 Va., 66. In the case cited the court said: 'The imposition and regulations of fines belong to the legislature, and to its discretion and judgment the widest latitude must be conceded. Fines are to be fixed with reference to the object they are designed to accomplish. . . . What is to be the legislative guide, in performance of its duty, but its sound judgment and the wisdom of experience? And how can courts with reason or propriety question the action of the legislature or control or restrain its discretion except where the minimum penalty is so plainly disproportioned to the offence or act for the violation of which it is affixed as to shock the sense of mankind.' There is a wide range for the discretion of the jury between the minimum and the maximum penalties fixed by this act, and we are not able to say that *the minimum penalty* inflicted upon an individual *would be so excessive* as to 'shock the sense of mankind.'"

The defendant has been convicted of, at the most, *two* offences. One of them was, that the *old* Waters-Pierce Co. agreed with Standard Oil Co. not to engage in business out of Texas and certain other territory, in consideration of the Standard Oil Co.'s agreeing not to extend its business into Texas and the other specified territory, and that this agreement was inherited by the defendant with the property and business of the old Waters-Pierce Co. The other was, that the Standard Oil Co. acquired and held a majority of the shares of the defendant company.

The former of these two offences has by statutory construction been turned into 1033, and the latter into 2521, separate offences, and a penalty of $1,623,900 has been imposed for them.

This result has been attained by multiplying each offence by the number of days that the state of things created by the agreement, or the ownership of the shares, continued. The jury have found that this was 1033 days while the act of 1899 was in force, and 1488 days since the act of 1903

(verdict, *ante* p. 47). Accordingly the two offences were multiplied by 1033, and a penalty imposed of something between $200 and $5000 for each day under the act of 1899, amounting in all to $1,549,500, the average of which would be $1500 a day. The penalties under the act of 1903 were arrived at by multiplying the latter offence by 1488 and imposing a penalty of $50 a day, making in all $74,400. This was done in accordance with the judge's charge (*ante* p. 47, par. XIV).

The act of 1899 provides in s. 5 (*post* p. 215) that any person, partnership, association, or corporation "*violating* any of the provisions of this act shall forfeit not less than $200 nor more than $5000 *for every such offence*, and *each day* such person, corporation, partnership or association shall continue *to do so*, shall be a separate offence."

The act of 1903 in s. 11 (*post* p. 223) provides that every person, corporation, or association who shall "*violate* any of the provisions of this act shall for *each and every day* that *such violation* shall be *committed or continued*, forfeit and pay the sum of $50."

The state courts have treated these provisions as meaning that, if a corporation enters into an agreement, or acquires the shares of another, contrary to the act of 1899, it continues *to do so* every day that the agreement is in force or the ownership of the shares exists; and, if it violates the act of 1903 by acquiring such shares, the *violation* is continued every day that it owns the shares. Effect has been given to them accordingly, and they must be taken in this Court to have the meaning so attributed to them.

The legislature may provide that the penalty to be imposed for an act that is made a criminal offence shall be measured by the time that the act or the state of things produced by it continues, if the penalty is not thereby rendered excessive. But it is not possible to change the

nature of the act itself, or to turn a single act into several distinct acts, by a statutory provision that every day the act or its effects continue shall be a separate offence. In determining whether the penalties imposed are excessive, it cannot be put out of sight that there is only one act, even if the punishment may properly be aggravated by the continuance.

An *agreement* entered into contrary to a statute is only entered into once, even though the statute provides that every day it remains in force shall be treated as if a separate agreement were entered into on that day. If the statute provides that the *acquisition of shares* in a company shall be considered as if a new acquisition of the shares were made on every day that the ownership of them continues in the same person, the shares are still in fact only acquired once, however bad it may be to keep them. The person who makes the agreement or acquires the shares, is not in the position of one who commits a number of distinct burglaries or makes several illegal sales of intoxicating liquor. When he complains that the penalty imposed on him is unreasonably severe for a single offence, it is not an answer to him to say that the statute provides that *every day* the agreement remains in force or the ownership of shares continues shall be a separate offence, and that the magnitude of the penalty is attributable to his repeated violations of the law. That answer is no better than it would have been if the statute had provided that *every hour*, or *every minute*, should be a separate offence. If the penalty is excessive for the single act that has been done contrary to the statute, continued in effect as long as it has been, it is not made reasonable by a provision of the statute that the act shall be *deemed to be* as many different offences as there are days in the period during which the effect has continued.

The defendant, having been convicted of one offence committed by its becoming a party to the agreement with the Standard Oil Co. on the 1st June 1900 and remaining a party to it till the 31st March 1903, and of another offence committed by means of the Standard Oil Co.'s owning a majority of the shares during the same period, has for those two offences been subjected to a penalty of $1,549,500.

The defendant has also been subjected to the additional penalty of $74,400 for the continuance of the ownership of the shares by the Standard Oil Co. from the 1st April 1903 to the 29th April 1907.

The former penalty was imposed under a statute which provided that the penalty for every offence under it should be not less than $200 nor more than $5000. The statute under which the latter penalty was imposed reduced the penalty to $50 for a single violation of its provisions.

The penalties that have been so imposed on the defendant have no relation to the two offences of which the defendant has been convicted. The largest penalty that could have been imposed for each of them at the time it was committed was $5000. The rest of the gross sum has been arrived at by multiplying the original offence by the number of days that have since elapsed. During that period no other wrongful act has been committed that could aggravate the original offence. The defendant has only carried on a lawful business in a lawful manner. The original penalty of $5000 imposed by the act of 1899 was in itself a heavy one. It was so heavy that it was reduced to $50 by the act of 1903. But, taking $5000 as the maximum penalty that could have been imposed under either act, the penalty of $1,623,900, into which the original penalty has been magnified solely on the ground that the agreement and the ownership of shares, which constituted the two offences, have not been undone, is so enormous and so disproportionate to anything that

has been done by the defendant, that it cannot be regarded otherwise than as an excessive fine.

Nobody can hesitate to say that the penalties are properly described as enormous, having regard to the similar description applied in this Court to the penalties imposed by the statutes under consideration in *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. p. 100, and *Ex parte Young*, 209 U. S. p. 144–148. They are more than enough to answer the test, proposed in *State* v. *Laredo Ice Co.*, 96 Tex. p. 467–468, of being "so great as to shock the sense of mankind."

The 8th amendment to the Constitution provides that "Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted."

This amendment and those that precede it have been held not to apply to the different States (*Pervear* v. *Com.*, 5 Wall. 475; *O'Neil* v. *Vermont*, 144 U. S. p. 332). But it has also been considered to declare one of the fundamental rights of life, liberty, and property, the observance of which by the States, as well as by the general government, is essential to due process of law, and is enforced by the 14th amendment (*O'Neil* v. *Vermont*, 144 U. S. p. 339–341, 370).

In *O'Neil* v. *Vermont*, 144 U. S. 323, the defendant had been convicted of 307 offences of selling intoxicating liquor in Vermont contrary to law, and sentenced to pay a fine of $6140, and, if he did not pay it before a specified date, to be imprisoned for 19,914 days. The statute prescribed as the punishment a penalty of $20 for each offence, and, in default of payment, three days imprisonment for each dollar of the penalty (p. 331). The majority of this Court declined to consider the question whether the defendant had been subjected to cruel and unusual punishment, on the ground that the question was not assigned as error (p. 331),

but Blatchford J. in delivering the judgment of the Court quoted from the opinion of the state court, "If the penalty were *unreasonably severe for a single offence*, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed." Three judges dissented, and one of them, Field J., considered the effect of cumulative punishments for different offences, in making the punishment for them excessive, and he also gives an illustration of a single offence multiplied by statute into many offences. He says (at p. 340),

> "It is no matter that by cumulative offences, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offences. The State may indeed make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration."

The defendant in the present case has not committed a great number of separate offences as the defendant had in that case. It has been convicted of only two distinct offences, which have by a process of statutory construction been treated as an immense number for the purpose of estimating the amount of the penalty to be imposed. That penalty is so enormous that it is in effect a confiscation of the defendant's property and so deprives the defendant of its property without due process of law.

For instances of penalties held to be excessive, see

State v. *Galveston, Harrisburg, San Antonio Ry. Co.*, 100 Tex. 153, 175; 97 S. W. 71.

State v. *Whitaker*, 43 La. Ann. 527.

See also *Porter* v. *Dawson Bridge Co.* 157 Pa. St. 374–379.

10. *Absence of Due Process of Law in the Proceedings at the Trial.*

The next question is whether the trial was so conducted according to the regular course of judicial proceedings that the judgment can be said to have been obtained by due process of law.

It is submitted that the judge wilfully and uniformly disregarded the rules of evidence throughout the trial and admitted against the defendant's objection a great mass of evidence that was so far from any connection with the case alleged against the defendant that it had no tendency to prove any part of the case, and could only confuse the jury or excite their prejudices against the defendant. Upon this evidence, and without having any evidence before the court that tended to establish the case against the defendant, the judge directed the jury to convict the defendant, if they found certain facts, of which there was no evidence, or for which the defendant was not in any way responsible.

The effect has been the same as if the jury had been allowed to convict the defendant without having any evidence whatever before them, or as if the case had been submitted to them upon such evidence as the newspapers and the letters of the state attorney-general that were put in evidence at the hearing of the motion for a change of venue (*Rec.* p. 208, 211, 253, 219–226), and without any other evidence.

There is no difference in principle between determining a case against a party in his absence and without his having had any opportunity of being present, and doing so in his presence without any evidence at all, or upon a mass of evidence that has no possible connection with the facts to be

established against him. (See *Hovey* v. *Elliott*, 167 U. S. p. 446.)

These objections are assigned as errors in this Court in the assignments of error, par. 13, 14, 15, 19, 24 (*ante* p. 68–77; *Rec.* p. 1198–1206). They were raised in the courts below by the objections and exceptions taken at the trial.

The action is stated in the petition to be brought against the defendant, which is described as acting as a corporation under a charter granted by the State of Missouri on the 29th May 1900 (*ante* p. 3; *Rec.* p. 2).

The petition begins by alleging *a conspiracy* in January 1870, between five persons mentioned by name, and others whose names are not given, to monopolise the trade in petroleum and its products throughout the United States, including Texas, and the defendant is said to have joined in this conspiracy (*ante* p. 3; *Rec.* p. 2).

In pursuance of the conspiracy, it is alleged, W. H. Waters, H. C. Pierce, the Chess-Carley Co., and the Standard Oil Co. (of Ohio) organised the *old* Waters-Pierce Co. under the laws of Missouri, with a capital of $100,000, and two fifths of the shares were issued to Waters and Pierce, two fifths to the Chess-Carley Co., and one fifth to the Standard Oil Co. This Waters-Pierce Co. is alleged to be in fact the same company as the defendant doing business under the charter of May 29th 1900, which adopted all the acts and carried out all the contracts and conspiracies of the company as originally organised and in every way has taken its place (*ante* p. 4; *Rec.* p. 3, 4–5).

The conspirators are alleged to have previously organised the Standard Oil Co. (of Ohio) and secured the control of a large number of corporations and firms, and to have conceived that the acquisition of all the oil business in the territory in which W. H. Waters and H. C. Pierce and the Chess-Carley Co. were engaged in business could be best

accomplished by forming a corporation in which those parties should have shares, and they and the corporation have ever since been parties to the conspiracy and acquiesced in the plans (*Rec.* p. 5).

As a part of the conspiracy, it is alleged, when the *old* Waters-Pierce Co. was formed, it was agreed that it should confine its business to Texas and certain other places and should not do business in other parts of the United States, and that the Standard Oil Co. should not do business in the territory so named as that of the Waters-Pierce Co., and this agreement has been acted upon by the defendant since its organisation to the present time (*Rec.* p. 6).

Certain persons and companies (39 in number) mentioned by name, and among them *H. C. Pierce* and the *Waters-Pierce Oil Co.*, and all companies and individuals mentioned in the Standard Oil Trust agreement afterwards set out (with 44 signatures), "and all officers and agents of said companies" are alleged to have been parties to the conspiracy and conspiracies (*Rec.* p. 3–4, 15).

Two trust agreements dated the 2nd and 4th January 1882 are set out (*Rec.* p. 7), to which it is alleged that the *old* Waters-Pierce Co. was a party, and by which the property of the parties was transferred to trustees for management and they received trust certificates for their respective interests (*Rec.* p. 7; *ante* p. 5–6). The shares in the *old* Waters-Pierce Co. held by the Chess-Carley Co. (400) and the Standard Oil Co. (200) were transferred to these trustees, who thus held three-fifths of all the shares (*Rec.* p. 18; *ante* p. 6). In 1892, when the trust was dissolved, the shares so held by the trustees were transferred to the Standard Oil Co. (of New Jersey) for the same purposes for which they had been held by the trustees (*Rec.* p. 20; *ante* p. 7). In 1900, when the *old* Waters-Pierce Co. was dissolved and the defendant company was formed, the Standard Oil Co. received the same number of shares in the new company as it had held in the old company (*Rec.* p. 24; *ante* p. 8–9).

The petition alleges that the defendant, in pursuance of the unlawful purposes, has given *rebates* secretly, has unfairly and secretly *reduced prices* where competition appeared "to less than schedule price," these acts constituting its ordinary course of business, and used *secret and questionable means* in obtaining information concerning the business of competitors (*Rec.* p. 34–35), and maintained a war of extermination against competitors and by *unfair competition* destroyed the business of competitors and established a monopoly in the state (*Rec.* p. 36–37).

At the trial no evidence was offered of the original conspiracy alleged to have been entered into in 1870, or of any of the other supposed conspiracies, or of any agreement to do any of the things alleged to have been the objects of the conspiracy.

Instead of it, the State only adduced evidence of the incorporation of the Standard Oil Co. (of Ohio) in January 1870, and this evidence was admitted against the objection of the defendant that it had no connection with the case against the defendant and that the event took place 30 years before the defendant was incorporated (*Rec.* p. 396; error assigned, p. 360, par. 116).

The incorporation of the *old* Waters-Pierce Co. in 1878 was put in evidence against the objection that it related only to a stranger to the case (*Rec.* p. 397; error assigned, p. 360, par. 117).

Then, against a like objection, the Standard Oil Trust agreements of the 2nd and 4th January 1882 were put in evidence (error assigned, p. 360, par. 118). But it was admitted by the State that even the *old* Waters-Pierce Co. had never executed either of them, and that *H. C. Pierce*, who owned 40 per cent. of the stock, neither signed, nor deposited any of his stock under, either of the agreements. It was agreed that H. A. Hutchins and W. P. Thompson, who then owned 40 per cent. and the Chess-

Carley Co., who owned 20 per cent., deposited their shares under the agreement, and that the trustees continued to hold 60 per cent. of the stock till 1892 (*Rec.* p. 398–400).

The absurd deposition of Ida M. Butts as to legal proceedings against the Standard Oil Co. in Ohio in 1892, which was on its face incompetent, and which was full of prejudicial language, was admitted against vigorous objection (*Rec.* p. 403–424).

The incorporation of the Standard Oil Co. (of New Jersey) in 1882, and of a number of other companies of which it held a majority of the shares, and an agreement by the parties that this Standard Oil Co. owned 2747 out of the total 4000 shares of the *old* Waters-Pierce Co. and since September 1900 has owned 2748 out of the total 4000 shares of the defendant company, were put in evidence, subject to objections of the defendant that they were irrelevant to any issue in the case (*Rec.* p. 400, 424–426; *ante* p. 20–21; errors assigned, *Rec.* p. 361–362, par. 128–140).

H. C. Pierce was not concerned in any of these companies, except the old and the new Waters-Pierce Co. (*ante* p. 21, 26).

The judgment against the *old* Waters-Pierce Co. in 1897, revoking its permit to do business in Texas, and the mandate of this Court reciting the affirmance of that judgment in 1900, were proved, against the objection that it was a judgment in a suit to which the defendant was not a party (*Rec.* p. 439; *ante* p. 21; error assigned, *Rec.* p. 363, par. 153–155).

The incorporation of the defendant company on the 29th May 1900 having been proved (*ante* p. 21), the State showed by a deposition of H. C. Pierce, that in 1878, when the *old* Waters-Pierce Co. was formed, it was agreed between him and the Standard Oil Co. that the *old* Waters-Pierce Co. should confine its operations within the territory in which his firm had previously transacted business, and this ter-

ritory, which he described, included Texas (*ante* p. 23), and that the *present* Waters-Pierce Co. in 1900 succeeded to the business of the old company and had since confined itself to building up the business in the territory formerly occupied by the old company and had not extended its business beyond that territory, where it was thoroughly and fully equipped (*ante* p. 24), but since that time there had never been any understanding or discussion with respect to the division of territory (*ante* p. 25).

It having been agreed by counsel that *Wade Hampton*, the general auditor of the Standard Oil Co., had written certain letters to the officers of the defendant company for the purpose of obtaining such information as would be revealed by an audit of its books and accounts (*ante* p. 27), the deposition of Wade Hampton, which had been previously taken by the State, was put in evidence by the State, not for the purpose of proving the facts to which he testified, but for the purpose, avowed in presence of the jury, of showing that he (who was charged in the petition as one of the "*conspirators*") was at the time he gave his testimony trying *to conceal* the facts that were afterwards admitted (*Rec.* p. 512, 513). This use of the testimony was objected to by the defendant on the grounds that he was not an agent of the defendant, that the general allegation (*Rec.* p. 3) of conspiracy did not make the testimony pertinent to such an inquiry (*Rec.* p. 512), that there was no conflict between the testimony and the admission, and that it was of no importance whether the auditors were sent by the Standard Oil Co. or the defendant (*Rec.* p. 530–551; *ante* p. 27).

In this deposition Wade Hampton testified that prior to May 29th 1900 the books of the *old* Waters-Pierce Co. were audited by him or under his direction (*Rec.* p. 518) and after that date the books were not audited under his direction, but by auditors of his employed by the Waters-Pierce Oil Co. direct (*Rec.* p. 520), and that he sent

the persons mentioned in the letters to be employed by that company to audit their books, and they were to be employed and paid by that company because they were performing work for it (*Rec.* p. 521; *ante* p. 27).

The judge admitted the evidence and left it to the jury to say whether there was any conflict between it and the admission (*Rec.* p. 531; *ante* p. 28), and it was assigned as error below (*Rec.* p. 364, par. 163–165).

The testimony of *A. H. Gardner* and *E. P. Pratt* (*ante* p. 29–30), employees of companies connected with the Standard Oil Co., as to the instructions they received from their employers, before the defendant was in existence, regarding the territory to which they were to confine their business, was objected to on the ground that it related to matters between other companies than the defendant and not concerning the defendant, but it was admitted on the ground that the companies to which it related were *alleged* in the petition to be *co-conspirators* with the defendant (*Rec.* p. 548, 549; errors assigned, p. 365, par. 175–178).

The witness *Royer Campbell* was allowed to testify, against the defendant's objections, to the competition he had with the *old* Waters-Pierce Co. in 1894, how that company dropped its price to meet his competition and solicited his customers (*Rec.* p. 697, 698, 699), and finally induced him to sell out his business and enter their employment (*Rec.* p. 701; errors assigned, p. 367, par. 199–201). He continued in their employment and that of the new company from 1894 to 1904 under the name of the Texas Oil & Gasoline Co., under which he had previously done business (*Rec.* p. 712, 724); rebates were sometimes paid to hold the trade, and in one instance, that of Horan & Co., rebates were paid after 1900 (*Rec.* p. 719, 729). He got information of outside business by spying on railroads and noting every suspicious tank car that came to town, and

reported it (*Rec.* p. 720–722; error assigned, p. 367, par. 204).

A. W. Clem was permitted to testify, against the defendant's objections, to his competition with the *old* Waters-Pierce Co. from 1890 to 1894 and the reduction of price made by that company, and how the price was advanced after he had sold his business to that company (*Rec.* p. 741–744; errors assigned, p. 368, par. 205–208).

The agreement of the 5th October 1894 by the Eagle Refining Co. and A. W. Clem with the *old* Waters-Pierce Co. (*Rec.* p. 39, C) was put in against the objection of the defendant (*Rec.* p. 646; error assigned, p. 367, par. 197).

C. W. Cahoon testified, against the defendant's objections (*Rec.* 799, 800), that during about 60 days in 1906 one kind of oil was sold in Texas by the defendant for another kind considered of higher quality, which the defendant could not procure; and, also against such objection (p. 807), as to the extent to which prices were changed to meet competition (errors assigned, p. 368, 369, par. 211, 216).

The testimony of the three witnesses (already referred to *ante* p. 85), as to disputes about the dividing lines in Missouri and Louisiana and directions not to sell beyond certain limits, related to the *old* Waters-Pierce Co. and to a time before the defendant existed, and was admitted against the defendant's objections (C. F. Hatfield, *Rec.* p. 435, 437; H. R. Knollenberg, p. 578; T. R. Hopkins, p. 581; errors assigned, p. 363, 366–367).

The testimony of the other witnesses already mentioned at p. 85–86, as to the orders given to them while they were in the employment of the Standard Oil Co. and other companies, also relate to a time preceding the incorporation of the defendant.

The evidence occupies pages 395–1140 in the printed record in this Court. In all this mass of testimony and documents, there is no evidence, direct or circumstantial, that the defendant ever entered into any kind of agreement or understanding with the Standard Oil Co. either to limit its business to any particular territory or to regulate or fix prices anywhere, or that it ever entered into any combination with that company or was a party to bringing its affairs under the same management or control as those of that company. If there was any such combination or common management or control, it consisted entirely in the ownership of a majority of the shares by the Standard Oil Co., in which the defendant had had no hand, and which arose from the interest acquired by that company, long before the passage of any anti-trust laws, in a property and business that the defendant afterwards took over. If there was any such agreement, it was only the agreement made by the *old* Waters-Pierce Co. in 1878, by which it agreed to limit the territory in which it should carry on business.

There is a great deal of documentary evidence relating to the formation of the Standard Oil Trust and of the Standard Oil Co. and the numerous companies that are connected with it in one way or another. The evidence shows the way in which the Standard Oil Co. came to have an interest in the defendant company, and why it did not acquire the entire interest in the shares of that company, and it has been shown that the transactions between them in the course of their business have been large, and the details of some of those transactions have been gone into. There is evidence that the *old* Waters-Pierce Co. carried on a vigorous competition with its rivals in Texas and lowered its prices in order to overcome their competition in a way that the petition calls "unfair competition," and that it systematically provided for ascertaining all that it could about the business carried on by its rivals. Whether this

course of business was right or wrong, none of the evidence relates to the defendant. Only one case is testified to in which the defendant ever gave rebates since 1900, that of Horan & Co., and no rule of law or morals has yet been laid down, that a man may not sell for such price, or make such discount from his asking price, as seems advantageous to him. There is evidence that the defendant did lower its prices at times to meet competition (as testified to by Cahoon), and that is the ordinary course of trade. But there is not a particle of evidence of the two principal things necessary to convict the defendant, namely, an agreement to regulate prices (or for a division of territory) entered into by the defendant with the Standard Oil Co., or a combination of any kind entered into by the defendant with that company.

It is not enough to say, as the Court of Civil Appeals says, that the evidence is very voluminous, and that to a large extent the case rests upon *circumstantial evidence* (*Rec.* p. 1161). Evidence is not circumstantial unless each part of it has some connection with and indicates in some degree the principal fact to be proved (1 Greenleaf Ev. s. 13, 13a; Best Ev. (5th ed.) 406, (9th ed.) 264). Independent circumstances that do not separately point to the desired conclusion, are not circumstantial, but only irrelevant, evidence (*Com.* v. *Jeffries*, 7 Allen p. 566, 567–568).

The fact that the defendant did not extend its business out of the district in which the *old* Waters-Pierce Co. had established the business afterwards acquired by the defendant, does not indicate in any degree that the defendant had made any agreement with the Standard Oil Co. not to extend its business into other places. Traders commonly limit their business to some locality, and, when they acquire a business established in a district, they generally continue to carry it on where they find it established, and there is no ground for inferring an agreement with some-

body not to extend it. The acquisition of a majority of the shares of the Waters-Pierce Co. by the Standard Oil Co. is not a ground for supposing that the Waters-Pierce Co. did anything to bring about the acquisition. The examination of the books of the Waters-Pierce Co. by auditors of the Standard Oil Co., which was the majority shareholder, and the information given to it by H. C. Pierce, the manager and minority shareholder, does not authorise a presumption that the Standard Oil Co. had any relations with the Waters-Pierce Co. except those of a large shareholder. The competition carried on by the *old* Waters-Pierce Co. with its rivals, the discounts or rebates that it gave to its customers, the means that it used to obtain information regarding the business of competitors, do not justify any inference that the defendant had entered into an agreement or a combination with the Standard Oil Co. These are *circumstances*, but they are not circumstances that have any tendency to prove the facts to be established. They are not links in a chain, and they cannot be fastened together to make a chain, for no one of them indicates the desired conclusion. A chain of circumstantial evidence can not be made out of any number of irrelevant circumstances, however great the number may be.

But the judge, with nothing but this great mass of irrelevant evidence before the jury, left to them the issues mentioned in par. VII–XI of his charge (*ante* p. 44–46; *Rec.* p. 288–291). In the four paragraphs VII–X, he directed them to convict the defendant if they found certain specified facts of which there was no evidence whatever. In paragraph XI, he directed them to convict *the defendant* if they found that the *Standard Oil Co.* had done certain things with a purpose and intention on the part of its officers to accomplish a certain result. The explanation in this last paragraph of what would constitute a combination was also sufficient to convict the defendant under paragraphs VIII–X for what the Standard Oil Co. had done.

The direction in par. XI necessarily involved the right of the defendant to its property against deprivation without due process of law, for it required the jury to impose penalties on the defendant, if they found that the Standard Oil Co. had violated the statute.

Wilson v. *Blackbird Creek Co.*, 2 Pet. p. 250–251.
Kaukauna Water Co. v. *Green Bay Canal Co.*, 142 U. S. p. 270–271.

There is no suggestion in the charge that any active participation on the part of the defendant was necessary. The direction was plain, that, if the *Standard Oil Co.* acquired a majority of the shares, and thereby effected a combination, and this was done with the specified purpose and intention on the part of its officers, *or* the effect of it tended to accomplish the specified object, then the penalties were to be imposed on the *defendant.*

This is nothing less than taking the property of the defendant and applying it in discharge of a penalty incurred by the Standard Oil Co., which does not differ in substance from transferring the property of the defendant directly to the Standard Oil Co., as already pointed out (*ante* p. 106–107).

Davidson v. *New Orleans*, 96 U. S. p. 102.

The definition of *combination* in par. XI, viz., if the Standard Oil Co. acquired a majority of the capital stock of the defendant corporation and "*thereby effected a combination* of said two corporations," applies equally to the combination which it was necessary to find in order to convict the defendant upon the issues submitted in the three other paragraphs VIII, IX, and X.

This definition in par. XI was given as a general definition of what would constitute a combination, and there is no suggestion of an intention that it should be considered as a definition only for the purposes of the issues

submitted in par. XI, and that something more was necessary to make a combination upon the other issues. Such an intention would not be a rational one: It could not be a combination under par. XI without being also a combination under par. VIII, IX, and X. The acts of the Standard Oil Co. alone were consequently sufficient under the judge's charge to make the defendant liable upon the other issues involving the charge of combination.

The admission of the evidence of the incorporation of the Standard Oil Co. (of Ohio) in 1870, and the subsequent incorporation of other Standard Oil Companies, and the organising of the Standard Oil Trust in 1882, and the incorporation of the *old* Waters-Pierce Co. in 1878, the subsequent revocation of its permit, and its dissolution, and the testimony regarding the doings and agreements of the agents of other companies than the defendant, against the objections of the defendant that these matters happened before the defendant existed and had no connection with the case against it, and the submission of the issues to the jury upon that evidence, and without any evidence according to the usual course of judicial procedure that the defendant had done any of the things that the judge authorised the jury to find that it had done, in themselves deprived the defendant of due process of law in the proceedings by which the penalties have been imposed upon it.

This deprivation was necessarily involved in the proceedings, and appears on the face of the record.

Willson v. *Blackbird Creek Co.*, 2 Pet. p. 250, 251.
Kaukauna Water Co. v. *Green Bay Canal Co.*, 142 U. S. p. 270–271.

If, instead of the 745 pages of evidence, there had been no evidence at all adduced at the trial, and the judge had directed the jury that the facts regarding the defendant were matters of such general knowledge in Texas that further

evidence was unnecessary, and that they might determine, according to such knowledge as they already had, whether the Waters-Pierce Oil Co. was "a trust," and that, if they found it to be a trust, they should impose penalties upon it at the rate of not less than $200 or more than $5000 a day, the objection that the defendant was deprived of its property without due process of law would be necessarily involved and would appear on the face of the proceedings, without an express reference to the Constitution of the United States.

It would be the same thing, if a lot of Texas newspapers like those already mentioned (*ante* p. 156) had been put in evidence, and the issues had been submitted to the jury upon that evidence alone.

It is submitted that the evidence upon which the issues have actually been submitted to the jury is as far removed from anything that could be considered evidence of the facts to be proved, as the newspapers would have been, and that the jury have found their verdict, not upon merely improper evidence, but upon no evidence at all, and that the judge arbitrarily and without any regard to the rules of law left the case to them with directions intended to mislead them into a conviction of the defendant without evidence.

The charge of *conspiracy* in the petition was made use of as an excuse for the admission of evidence of all sorts of agreements and acts of persons and corporations other than the defendant or its agents, whether the agreements or acts were made or done before or after the defendant came into existence. This charge was probably made in the petition for that purpose, and all companies and persons, whose doings it was desired to put in evidence, were named or described in it as *conspirators* (see the list, *Rec.* p. 3–4, 7–8, 15–16). But no pretence was made of adducing any *evidence* of any conspiracy between these companies and persons, or any of them, or of the concurrence of the *defendant*

in any of their agreements. The judge never once asked for evidence of conspiracy, or for an assurance that such evidence would be produced, as a condition of the admission of any evidence that was offered. He only asked if the evidence related to a company that was *alleged* to be a conspirator, and, on receiving an affirmative answer, immediately admitted the evidence (*Rec.* p. 548, 551, *A. H. Gardner, E. P. Pratt*). An instance of the way in which this general charge of conspiracy was worked is the case of Wade Hampton, the general auditor of the Standard Oil Co., whose testimony taken by deposition was put in evidence by the State for the purpose of showing a supposed *conflict* between his testimony and the subsequently admitted fact that the defendant's books and accounts were examined by the Standard Oil Co., and of inferring from that conflict an attempt by the defendant through him *to conceal* the admitted fact (*ante* p. 27; *Rec.* p. 512–513, 530–531). Wade Hampton is in the list of alleged conspirators in the petition (*Rec.* p. 3), but he was not connected with the defendant in any way, and there is no other evidence in the case about him or his doings.

The conspiracy alleged in the petition is, that about January 1st 1870 certain persons "conceived the scheme of monopolising and controlling the business of refining, transporting, and selling petroleum and the products thereof throughout the United States, including the state of Texas; that *to that end* they entered into a conspiracy and a series of conspiracies" (*Rec.* p. 2), but there is no allegation of any unlawful means used to carry out the scheme. It is not alleged that it was part of the scheme to exclude other persons from the business, either by contracts or otherwise. The allegation of a scheme of *monopolising*, without indicating the methods of accomplishing that purpose, is as vague and indefinite as a general charge of *conspiracy* would have been without specifying

the purpose, or the means of carrying it into effect (*Ambler* v. *Choteau*, 107 U. S. p. 591). If there was to be only a large combination, either in the form of a corporation or a trust, and it was not part of the scheme to exclude other persons by means other than inducing the public to trade with the combination, there was no monopoly, and they were only trying for what Lord Hannen says is the object of every trader. "*The object of every trader* is to procure for himself as large a share of the trade he is engaged in as he can" (*Mogul Steamship Co.'s Case*, [1892] A. C. p. 58).

The only evidence of anything that happened in 1870 was that of the incorporation of the Standard Oil Co. (of Ohio) on the 10th January 1870 by certain persons (of whom H. C. Pierce was *not* one) (*ante* p. 19; *Rec.* p. 396, 998), the purpose being "the manufacture of petroleum and to deal in petroleum and its products" (*Rec.* p. 999), and this is presumably the whole foundation of the charge of conspiracy at that time.

Four years after the incorporation of the *old* Waters-Pierce Oil Co. (*ante* p. 19), came the Standard Oil Trust agreements of the 2nd and 4th January 1882 (*ante* p. 19), to which the petition alleges that the Waters-Pierce Oil Co. became a party about those dates (*Rec.* p. 7), and *H. C. Pierce* is in the list of conspirators in the petition (*Rec.* p. 3). But it was agreed by counsel at the trial that the old *Waters-Pierce Oil Co.* did *not* sign either of the agreements, and that *H. C. Pierce*, who owned 40 per cent. of the shares, did *not* sign or deposit his shares under them, though the holders of the other 60 per cent. did sign or deposit their shares (*ante* p. 19; *Rec.* p. 399). Yet notwithstanding this admission that the *old* Waters-Pierce Co. did not become a party to the trust, and the fact that it was dissolved long before the defendant came into existence (*ante* p. 7, 20), and against the defendant's objections (*Rec.* p. 398), it was admitted in evidence (*Rec.* p. 400).

The purpose of this trust was to consolidate the business of a number of different companies and persons in the manner shortly described *ante* p. 5–6, and fully in the documents set out in the *Record* p. 7–15. It was a perfectly lawful and proper purpose, whether it was carried out by means of a trust or under the form of a corporation. At that time, even the laws of Texas had not attempted to prohibit such combinations in that state. When the trust was dissolved in 1892 in consequence of the legal proceedings in Ohio, of which Mrs. Ida Butts undertook to give an account (*Rec.* p. 403–424), it was because the Supreme Court of that state had decided that the transfer of the property and business of the Ohio corporation was *ultra vires*, as appears by *State* v. *Standard Oil Co.*, 49 Ohio St. 137. But whether the objects of this trust were lawful or unlawful, it ought not to have been brought into the case against *the defendant*, which never became a party to it.

By the Special Charge No. 13 (*Rec.* p. 303), which was refused, the judge was asked to direct the jury that, as this agreement and supplemental agreement were executed long prior to the creation of the defendant, and there was no evidence that the defendant ever adopted the agreement, they should not consider it as affecting the defendant.

This directly raised the question whether the defendant's property was to be taken from it in the form of a penalty on account of an agreement between other people, to which the defendant never was, and never could have been, a party, and necessarily involved its rights under the 14th amendment of the Constitution.

It is a matter of common knowledge that the Standard Oil Co. is an object of odium in some parts of the country, and it is evident that this is the general state of feeling towards it in Texas. The only purpose of all the evidence about the Standard Oil Trust and the Standard Oil Com-

panies and the *old* Waters-Pierce Oil Co. was to establish in the minds of the jury some connection between the Standard Oil Co. and the defendant that might have the effect of turning this feeling against the defendant. The judge did all he could to assist this purpose and with complete success.

He began his charge to the jury by repeating to them that the State alleged that in 1870 there was *a conspiracy* formed for monopolising and controlling the business, and that under this conspiracy the defendant had done various acts and entered into various agreements which constituted violations of the anti-trust laws (*Rec.* p. 284). He referred in par. V (p. 287) to the evidence of the doings and agreements of the agents of corporations other than the defendant and of the *old* Waters-Pierce Co. *before* June 1st 1900 and the doings of individuals *before* and after that date and within and out of Texas, and told them that none of it could be considered by them, *except* within the limitations and for the purposes afterwards stated. He then directed the jury that, if they found from the other evidence, that on June 1st 1900 there was formed *or existed* an *agreement* between the officers of *the defendant* and the officers of any of the other corporations, or any of the individuals, alleged in the petition to be *co-conspirators* with the defendant, relating to the management of the defendant's business, *then* they might consider for what they thought it worth, such acts or declarations of *all the parties* to the agreement and *their agents* during its existence and in furtherance of its execution for the purpose of determining its character and whether it contemplated a violation by the defendant of the Texas anti-trust laws.

This direction and his refusal to direct the jury (Special Charge No. 15, *Rec.* p. 304) that the defendant was not responsible for any act occurring prior to May 31st 1900 and that the jury should disregard evidence of acts and

transactions before that date, show that he meant to allow the jury to consider the evidence of such previous acts and transactions if they were done or made during the continuance of the agreement referred to. This could only be effected within the words of the charge by treating the agreement of the *old* company as an agreement of the *defendant*. He must have intended that this should be done, for otherwise he would not have referred expressly to acts and transactions *prior* to June 1st as well as to subsequent ones.

The intimation that an agreement relating to the management of the defendant's business might have *existed* on the 1st June 1900 (three days after the defendant had been incorporated) can only refer to the agreement made by the *old* Waters-Pierce Co. in 1878 for the division of territory. The jury were thus invited to treat that as an *existing* agreement of the defendant at its birth, and as a *conspiracy* which would entail the consequences that have been mentioned. There is no suggestion that the defendant need manifest *its assent* to the *existing* agreement before it would have such an effect, and for that purpose the jury were allowed to identify the defendant with the *old* Waters-Pierce Co.

No other justification has ever been given for admitting in evidence against the defendant all the details of the organisation of the Standard Oil Trust and the various Standard Oil Companies from 1870 down to 1900, and the testimony regarding their doings and those of other persons and companies, except the charge, unsupported by any evidence, of *a conspiracy*, to which the defendant is assumed to have become a party by an agreement made, not by *the defendant*, but by the *old* Waters-Pierce Co., with the Standard Oil Co. in 1878 for a division of territory.

The judge also told the jury in par. XIII (*Rec.* p. 292), that evidence had been introduced tending to show that

the defendant had given *rebates and discounts* in the course of its dealings; also that *the defendant* had made *contracts* and entered into *understandings* other than those submitted for the consideration of the jury in par. VII–XI; also tending to show the *general course of dealings* of the defendant, including some of its business methods in *meeting competition*.

This could not have been said to the jury unless the judge had intended that *the defendant* should be identified with the *old* Waters-Pierce Co. For, as already pointed out, the evidence of *rebates and discounts* applied almost wholly to the *old* company, and only Royer Campbell was able to mention one case, that of Horan & Co., in which this had been done since 1900, and the judge could hardly have intended that alone. The same remark applies to the other *contracts and understandings*, and the *course of dealings*, and methods in *meeting competition*. The testimony of Campbell, Clem, and Cahoon, on these points is mentioned *ante* p. 162-163.

But the judge proceeded to tell the jury that this evidence showed *no violation* of the anti-trust laws, *unless it tended to establish* one or more of the issues submitted to them in par. VII–XI, and they were therefore instructed to return a general verdict for the defendant, notwithstanding that evidence, *unless* they found in favor of the State on the issues submitted to them in one or more of those paragraphs.

The jury were thus directly authorised to consider the rebates and discounts, and other agreements and understandings, and methods of meeting competition, as much as they liked, upon any of those issues, although none of these doings were unlawful, and although almost all of them were doings of the *old* Waters-Pierce Co. and *not* of the defendant.

There is an insinuation in this part of the charge that these things, although not themselves contrary to the anti-trust laws, tended to prove that the defendant was

engaged in transactions that did violate them. But what possible connection was there between these things and the issues? *Rebates and discounts* from what a trader first gives out as his price, are common incidents of trade and bargaining, whether they are given to induce prompt payment or to attract desirable customers. They have been forbidden by recent statutes as to railway companies and some public carriers, but no attempt has yet been made to apply similar rules to private traders. The ordinary way of *competition* is by a lowering of prices in order to attract the trade that might otherwise fall to a competitor. It would be difficult to make a law encouraging competition, and at the same time providing that it shall not be carried so far as to interfere with the business of competitors. If the *old* Waters-Pierce Co. in 1894 lowered its prices in order to draw business away from Royer Campbell, and solicited business from his customers and from Mrs. Campbell (*ante* p. 37; *Rec.* p. 698–699), that had no tendency to show the existence of a combination between that company and the Standard Oil Co., or the effects of one. Campbell himself "cut his price" and tried to get away the customers of the *old* Waters-Pierce Co. "when the fight was on" (*Rec.* p. 698–699), but that was no evidence that *he* was in a combination with the Standard Oil Co. Yet he, as well as the *old* Waters-Pierce Co., engaged in *competition*, which the counsel for the State properly defined as *warfare* (*Rec.* p. 697, 699). Clem tried a similar competition by underselling the *old* Waters-Pierce Co. in 1890 and 1891 (*Rec.* p. 743, 748). As to the evidence that the *old* Waters-Pierce Co. had a system of *acquiring information* regarding the business of competitors, it can only be said that it would be strange if the company undertook to carry on a large business without taking steps to obtain such information, and the judge's reference to the defendant's *methods in meeting competition* can only be considered as a hint to the jury to consider this evidence to the defendant's disadvantage.

This evidence was adduced in support of the charges of *"unfair competition"* and maintaining *"a war of extermination of all competitors,"* which are contained in the petition (*ante* p. 13) and were read to the jury. These phrases appeal to popular sympathy, but they are meaningless as descriptions of anything except the *"competition, free, and unrestricted"* which the courts regard as "the general rule which governs all the ordinary business pursuits and transactions of life."

U. S. v. *Trans-Missouri Freight Association*, 166 U. S. p. 337.

Thomson v. *Union Castle Steamship Co.*, 149 Fed. R. p. 935 (Hough J.).

It is easy to see how these things might appeal to the prejudices of the jury, but it is not apparent how any one of them could relate to any of the issues.

A similar observation applies to the testimony of C. W. Cahoon (*ante* p. 163) regarding the sales of one kind of oil for another during a short period, and the extent to which prices were changed to meet competition. These matters had no possible relation to the issues in the case, but they were likely to have the effect, for which they were introduced, of prejudicing the jury (*Rec.* p. 799, 800).

The objections of the defendant to the admission of evidence were regularly and systematically overruled by the judge, although substantially all the evidence was irrelevant according to any established rules of evidence and could only have the effect of exciting prejudice against the defendant or of confusing its identity with that of some other corporation.

In one instance (*Rec.* p. 794) during C. W. Cahoon's testimony, a letter was offered, in which he asked whether he would be allowed to sell an inferior grade as Eupion oil, and the judge excluded it on the ground that it was

more calculated to arouse the *prejudice* of the jury, than to show that the anti-trust law had been violated, but everything else that could arouse their prejudice was admitted, even upon the subject to which this letter was said to relate. Cahoon's own testimony as to his actual sales of one kind of oil for the other was admitted, against the objection that it could only arouse prejudice (p. 799–800). And nothing was more calculated to arouse prejudice than the inflammatory statements in the petition (p. 33, 36–37) about unreasonable and unconscionable prices, cutting prices, the rebates, gratuities, and bribes, a system of spies, corrupting railway officials, the war of extermination and unfair competition, alleged to constitute the defendant's ordinary course of business. These statements were excepted to (p. 73, 75, par. 77, 80), but the exceptions were overruled (p. 97) though the statements were entirely irrelevant, and the counsel for the State were allowed to read those statements to the jury. The same thing may be said of the affidavit of H. C. Pierce set out in the petition with an allegation that the statements in it were false and fraudulent and made for the purpose of deceiving the officers of the state (p. 26–27), which was excepted to (p. 75, par. 81), but the exception was overruled (p. 97), though at the trial, after this matter had been read to the jury, the affidavit was excluded because it was irrelevant (p. 518).

It is not contended that this Court can revise the decisions of the state courts merely on the ground that those decisions are erroneous in law or fact. If the proceedings were conducted according to the regular course of judicial procedure and not in reckless disregard of the defendant's rights, the decisions of the state courts are conclusive, except upon questions arising under the Constitution or laws of the United States, and do not deprive him of his property without due process of law.

In re Converse, 137 U. S. p. 631.

Backus v. *Fort Street Union Depot Co.*, 169 U. S. p. 566.
Smiley v. *Kansas*, 196 U. S. p. 453–454.

But in order that the decision may have this effect, it is necessary that there be, not only the form, but the substance, of a trial according to the regular course of procedure, and not in reckless disregard of his rights.

See *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. p. 565–566.
Fayerweather v. *Ritch*, 195 U. S. p. 297–299.
Patterson v. *Colorado*, 205 U. S. p. 461.

The trial must be "according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the *arbitrary exercise* of the powers of government unrestrained by the established principles of private right and distributive justice. . . . But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its *judicial authorities* may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final *action* would be inconsistent with that amendment. In determining what is due process of law regard must be had to *substance*, not to *form*" (*Chicago, Burlington, & Quincy Rld. Co.* v. *Chicago*, 166 U. S. p. 234).

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. p. 569, 575, 576, it was said, "It is obvious that the award, whether adequate or not, was not in reckless disregard of their rights." "They were not denied 'due process of law.' The proceedings were had before a duly constituted tribunal, in accordance with the declared law of the state, with full opportunity to be heard." "The error, if any there be, was not one 'in *absolute disregard of their right* to just compensation,' but was only error in the administration of the law under which those proceedings were instituted."

In *Tracy* v. *Ginzberg*, 205 U. S. 170, where the cancellation of a liquor licence in which the plaintiff had an interest was held not to deprive him of his property without due process of law, the Court said (p. 178) that such "a deprivation . . . occurs when it results from the *arbitrary exercise* of power inconsistent with 'those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors,'" &c.

In *Patterson* v. *Colorado*, 205 U. S. p. 461, where the plaintiff had been committed for contempt of court, it was said that his acts were "far from showing that innocent conduct has been laid hold of as an arbitrary pretence for an *arbitrary* punishment."

In *Hovey* v. *Elliott*, 167 U. S. 409, where, the defendant being in contempt, his answer was struck out and judgment given against him, this Court said (p. 415), "It would be like saying to a party, appear and you shall be heard; and, when he has appeared, saying, your appearance shall not be recognised, and you shall not be heard." And at p. 446, "There is no distinction in principle between determining a cause upon issues not raised by the pleadings in the actual absence of the party, and rendering a decree by refusing to permit a defendant to be heard in his defence or to consider the merits of a sufficient defence, and indeed by striking the pleading containing such defence from the files."

In *Ex parte Virginia*, 100 U. S. p. 367, it was said by Field J. of the clause regarding the equal protection of the laws, "It opens the courts of the country to every one, on the same terms, for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts; it assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness,

to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others; and in the administration of criminal justice it permits no different or greater punishment to be imposed upon one than such as is prescribed to all for like offences." See also p. 347.

The prohibitions of the 14th amendment extend to all acts of the State, whether done through its legislative, executive or judicial authorities, and whoever by his public position deprives another of any right protected by those provisions violates the Constitution, and, as he represents the State, his act is that of the State.

Scott v. *McNeal*, 154 U. S. p. 45.
Waterworks Co. v. *Owensboro*, 200 U. S. p. 45.
Londoner v. *Denver*, 210 U. S. p. 386.

In *Vandalia Rld. Co.* v. *South Bend*, 207 U. S. 359, where there was a question what matter was determined by the court below, it was said that the construction of a pleading and the validity of an agreement are as a rule local questions, and it was added (p. 367), "A case may arise in which it is apparent that a federal question . . . is avoided by giving an unreasonable construction to pleadings, but that is not this case."

In *Yick Wo* v. *Hopkins*, 118 U. S. p. 373, this Court said, "Though the law itself be fair on its face and impartial in appearance, yet, if it is *applied* and administered by public authority *with an evil eye and an unequal hand*, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

It is submitted that the defendant has not been tried according to the regular course of judicial procedure, but on the contrary has had a judgment given against it after

the form, without the substance, of a trial, in which no evidence was adduced against the defendant, but a great deal of evidence about other companies and persons was submitted to the jury, and the judge then left to them issues upon which there was no evidence whatever against the defendant. It appears by the evidence that was admitted and by the judge's rulings at the trial and his directions to the jury that this was done in reckless disregard of the defendant's rights. The defendant is in as bad a position as if its defence had been struck out and a verdict had been given against it without the pretence of any evidence. No consideration was given to the merits of its defence. The presence of the "evil eye and unequal hand" is evident throughout the proceedings.

It cannot be reasonably said that any of the doings or agreements of the *old* Waters-Pierce Co. had any such fair relation to the question whether the defendant had violated the Texas anti-trust laws, as to make it evidence upon that question.

There was no such relation between them as might have justified the legislature in providing that they should be evidence against the defendant.

See *People* v. *Cannon*, 139 N. Y. p. 43, 45.
Com. v. *Anselvitch*, 186 Mass. p. 378–379.

The defendant did not succeed to the liabilities or obligations of the *old* Waters-Pierce Co. (*Armour* v. *Bement's Sons*, 123 Fed. R. 56), and the legislature could not have imposed those liabilities or obligations upon the defendant (*Woodward* v. *Central Vermont Ry. Co.*, 180 Mass. 599).

If the evidence relating to the *old* Waters-Pierce Co. is struck out of the case, nothing remains that would give any color for the judge's directions to the jury or for their verdict.

There was in fact no relevant evidence in the case except

the incorporation of the defendant and the granting of the permit to do business in Texas.

It is useless to say that judgment cannot be given against a man without permitting him to be heard or without considering the merits of his defence, unless the defendant is entitled to have this Court consider the question whether the proceedings at the trial were not conducted without evidence and in arbitrary disregard of its rights. The jurisdiction of this Court could always be evaded by taking the course that was taken in the present case, and allowing a mass of testimony relating to other persons and things to be given and, after the form of a trial, arbitrarily pronouncing judgment against him. The reasons given for the decision in *Hovey* v. *Elliott*, 167 U. S. 409, and the other cases that have been referred to, seem to imply that this Court will look into the proceedings far enough to see whether they have been reasonably conducted, before deciding that they constitute due process of law.

It is submitted that this question appears on the record and was necessarily involved in the decision of the state courts, as plainly as it would have been if the judge had told the jury they might find a verdict against the defendant without any evidence at all (vid. *ante* p. 156, 168). The objection could not be taken at the trial before the judge himself, that he was wilfully perverting the course of justice and arbitrarily disregarding the defendant's rights. But if it appears on the record that he has done so, then the question of the defendant's constitutional rights is necessarily involved (*ante* p. 167, 168).

11. *The Permit a Contract with the State.*

It is stated in the petition that the defendant is doing business in Texas by virtue of a permit issued by the secretary of state on the 31st May 1900 (*ante* p. 3, 9; *Rec.* p. 2, 27).

By this permit, which was put in evidence by the State and bore date the 31st May 1900 (*ante* p. 21; *Rec.* p. 439, copy set out p. 1088), it was certified that the defendant, having that day paid the full amount of fees and taxes prescribed by the laws of the State and having complied fully with the law in all respects, was thereby granted permission to do business in Texas for the purposes mentioned *for a term of ten years* from the date thereof.

The statutory provisions under which this permit was issued are contained in the Revised Civil Statutes 1895, and are as follows,

> [page 187] "Art. 745. Hereafter any corporation for pecuniary profit, except as hereinafter provided, organized or created under the laws of any other state, or of any territory of the United States, or any municipality of such state or territory, or of any foreign government, sovereignty or municipality, desiring to transact business in this state, or solicit business in this state, or establish a general or special office in this state, shall be and the same are hereby required to file with the secretary of state a duly certified copy of its articles of incorporation, and thereupon the secretary of state shall issue to such corporation a permit to transact business in this state. If such corporation is created for more than one purpose the permit may be limited to one or more purposes." [An amendment added by General Laws 1897, c. 119 (p. 167) is immaterial.]
>
> [p. 188] "Art. 748. No permit shall be issued for a longer period than ten years from the date of filing such articles of incorporation in the office of the secretary of state."

[p. 481] "Art. 2439. The secretary of state, besides other fees that may be prescribed by law, is authorized and required to charge for the use of the state the following fees: [p. 482] . . . Each foreign corporation shall pay fees as follows: If its capital stock be one hundred thousand dollars or less, a fee of twenty-five dollars to procure a permit; if its capital stock be more than one hundred thousand dollars, and less than five hundred thousand dollars, it shall pay a fee of fifty dollars; if its capital stock be five hundred thousand dollars, and less than one million dollars, it shall pay a fee of one hundred dollars; if its capital stock exceed one million dollars, it shall pay a fee of two hundred dollars. All fees mentioned in this article shall be paid in advance into the office of secretary of state, and shall be by him paid into the state treasury monthly."

[p. 1077] "Art. 5243i. Each and every private domestic corporation heretofore chartered or that may be hereafter chartered under the laws of this state, and each and every foreign corporation that has received or may hereafter receive a permit to do business under the laws of this state in this state, shall pay to the secretary of state, annually, on or before the first day of May, a franchise tax of ten dollars. Any such corporation which shall fail to pay the tax provided for in this article shall, because of such failure, forfeit their charter."

The permit so issued upon payment of the fees and taxes required by these provisions of law constituted a contract on the part of the State that the defendant should have a right to do business in Texas during the term specified in it, and the State was not at liberty to revoke the permission so given, unless the defendant gave sufficient cause for its revocation.

American Smelting Co. v. *Colorado*, 204 U. S. 103.

The time for which the right to do business in the state was to continue, which in the case just cited was inferred from provisions of the statute that such corporations should be subject to the same liabilities and restrictions as domestic corporations, is in the present case expressed in the permit

in accordance with the statute limiting the time to ten years. This case therefore is free from any question of construction like the one that was involved in that case.

It was said in that case (204 U. S. p. 111), "Undoubtedly, if the corporation violated the laws of the state properly applicable to it, or if otherwise it gave just cause for its expulsion, it could not insist on such a contract as a defence."

In *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. p. 47, it was held that the provisions of the statute under which a permit was issued justified its revocation for a violation of statutory provisions that were in force at the time of its issue, although they were invalid, on account of discrimination, so far as they assumed to impose pecuniary penalties, as already explained, *ante* p. 117. It is not questioned that the *permit* might also be annulled, as the *charter* of a corporation may be, for the violation of valid laws subsequently passed and regulating the use of its privileges, as shown, in the case of a charter, by *Cosmopolitan Club* v. *Virginia*, 208 U. S. 378.

But the permit cannot be revoked in any of these cases, unless a violation of the statutory provisions justifying its revocation is established according to due process of law. In *Cosmopolitan Club* v. *Virginia*, 208 U. S. p. 384–385, the proceedings were examined and held to be consistent with the due process enjoined by the Constitution. The decision in *American Smelting Co.* v. *Colorado*, 204 U. S. p. 111, 113, shows that the permit gives a right which cannot be revoked arbitrarily or at the pleasure of the State.

It was agreed that the defendant had paid the annual franchise taxes required by the laws, but the evidence was excluded on the ground that it was immaterial (*Rec.* p. 997). The evidence probably was immaterial, as the State made no claim on the ground that they had not been paid.

Accordingly it is submitted that, if the judgment is reversed as to the penalties, it should also be reversed on the same ground as to the cancellation of the permit, in each of the following cases, viz.,

(1) If the Court is of the opinion that the statutes are too indefinite in their terms to justify the imposition of penalties upon the defendant for the matters of which it has been convicted by the jury. The reasons for so considering them have been discussed under **8** (*ante* p. 134) and are applicable, as well to a deprivation of the right granted by the permit, as to the imposition of pecuniary penalties.

(2) If the proceedings at the trial were not consistent with the requirement of due process of law, as it is submitted that they were not. This point is discussed under **10** (*ante* p. 156).

(3) The revocation of the permit on account of an agreement made by the *old* Waters-Pierce Co. in 1878, long before the passage of either of the statutes, would likewise deprive the defendant of its property without due process of law, in the same manner as the imposition of penalties would do, which is considered under **1** (*ante* p. 83).

(4) The acts of the Standard Oil Co., in acquiring a majority of the shares of the *old* Waters-Pierce Co. and thereby forming the combination long before the passage of either of the statutes, were also no justification for depriving the defendant of the rights granted to it by the permit. These points have been considered under **4** and **6** (*ante* p. 103, 113).

12. *The Order for a Receiver dependent upon the Judgment.*

It is submitted that, if the judgment is reversed as to the penalties and the cancellation of the permit, or as to the penalties alone, the order for the appointment of a receiver should also be reversed, on the ground that it is dependent on the judgment and cannot stand when that foundation is taken away.

The order for the appointment of a receiver was made upon an application to the District Court in the original action after the judgment (*Rec.* p. 323, 327–329). All the proceedings in that court relating to the receiver are set out in the transcript of the whole record filed in the Court of Civil Appeals in the principal case to which reference has hitherto been made (*Rec.* p. 323–352, and these pages are identical with p. 1–30 in the record of the case No. 360 in this Court). The assignments of error in the court below relating to the receiver are set out in the same record (*Rec.* p. 381–384, par 285–298) and are the same as those set out in the record in the other case (*Rec.* No. 360, p. 31–34). The assignments of error in this Court are the same in both cases (*Rec.* No. 359, p. 1188; *Rec.* No. 360, p. 84). And the appointment of a receiver after judgment had been improperly given as aforesaid is assigned as error in this Court (*ante* p. 78, par. 28; *Rec.* No. 359, p. 1208; *Rec.* No. 360, p. 103).

Accordingly every question that is raised regarding the appointment of the receiver is presented by the record in the principal case, and the record in the other case contains nothing that is not in the record in the principal case.

The manner in which there came to be a second record

in the Court of Civil Appeals of the part of the proceedings relating to the receiver, although there was only one record in the District Court, and the circumstances in which the Court of Civil Appeals heard and gave judgment upon the part relating to the receiver before it determined the original appeal, have been stated *ante* p. 2–3 and in the brief accompanying the motion that has been made to consolidate No. 360 with the principal case, No. 359.

The Supreme Court of the State, in an opinion printed with the record in the latter case (*Rec.* No. 360, p. 75), said that the order appointing the receiver might have been reviewed upon the appeal of the principal case. It is plain therefore that the questions affecting that order arise upon the record in the principal case.

It should also be observed that the Supreme Court held in *Farmers & Merchants Bank* v. *Waco Electric Co.*, 89 Tex. 331, that two separate transcripts filed in the Court of Civil Appeals upon two appeals did not make two cases out of one.

The Court of Civil Appeals in delivering judgment in the principal case on the 11th December 1907 (*Rec.* No. 359, p. 1141), after having previously on the 23rd October 1907 (*Rec.* No. 360, p. 56) affirmed the order appointing the receiver, declined to reconsider its previous decision, saying (*Rec.* No. 359, p. 1152),

> "In reference to the assignments of error complaining of the order of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute *a separate appeal** from that order, and this court, in considering that appeal, has decided against appellant. It is not entitled to have the order of appointing a receiver reviewed by this court twice in two distinct proceedings."

But the *judgment* of the Court of Civil Appeals in that

* It was not *a separate appeal*, but the same appeal with a separate transcript of part of the record. See *post* p. 210–211.

case was given upon the whole of the record (*Rec.* No. 359, p. 1162) and affirmed the whole of the judgment of the court below upon the whole of that record, which included, as well the original judgment for penalties and cancellation of the permit, as the subsequent order appointing the receiver.

Nobody would doubt this, if it were not known that the Court of Civil Appeals, upon a separate transcript of a part of the record, had separately affirmed the *judgment* of the court below as regards the receiver (*Rec.* No. 360, p. 56). But that fact does not appear in the record of the principal case and cannot be considered in determining what questions arise upon that record. The Supreme Court has decided that the validity of the order appointing the receiver was one of those questions. This question, being in the record, was not removed from it by the subsequent filing of a separate transcript of a part of the record or by the judgment given upon that separate transcript, and is still in the whole record as it is brought into this Court in the principal case.

The fact that the Court of Civil Appeals had already considered the question of the receiver upon the separate transcript, might have been a sufficient ground for not giving *its reasons* again for a like decision in the principal case if the same reasons were applicable, but *judgment* could not be given in the principal case without disposing of all the questions presented by the record. The judgment affirming the judgment of the court below was plainly intended as a disposition of all the questions so presented, and accordingly it extended both to the original judgment and the order appointing the receiver.

This point is not important if the motion for a consolidation of the two cases is granted. But if the cases are not consolidated in this Court, and the record in the principal case cannot be considered in disposing of the case relating only to the receiver, then it is submitted that

the record in the latter case cannot be used for the purpose of limiting the questions that arise upon the record in the former.

[The *Record* in the principal case, No. 359, will therefore continue to be referred to as the record, except where the other is specially mentioned.]

The order appointing the receiver is dependent upon the original judgment, and, if that is reversed as to the parts above-mentioned, the ground upon which the order was made no longer exists.

The application for the appointment of a receiver alleged the recovery of judgment in the same action and the other matters already mentioned (*ante* p. 48), and the defendant demurred to the application, and for answer thereto denied all and singular the allegations therein contained (*ante* p. 49; *Rec.* p. 325).

Upon the hearing of the application, as soon as counsel for the defendant had argued the demurrer, the judge stopped the counsel for the State, and, without hearing any evidence, announced his decision that he should take *judicial notice* of the proceedings in the main case and of the *judgment* against the defendant for violating the anti-trust laws (from which the defendant had already appealed, *Rec.* p. 319–320), and that it had been found guilty of violating the anti-trust laws on every day from the 1st June 1900 to the 29th April 1907, and that its permit had been cancelled by reason of the violations, and that it had since May 31, 1900, been a member of an agreement which had its existence in Texas in violation of the civil and criminal laws of Texas, and that it was in possession of certain instrumentalities by means of which, in violation of the public welfare and interests, it intended to continue its violation of the law pending appeal from the judgment of conviction, and that the judge would assume that a proper supersedeas bond would be given to super-

sede further proceedings on the judgment, but, as he had learned from interviews published in the *newspapers* that the defendant intended to continue its business in the state as before, notwithstanding the judgment, he would appoint a receiver to take charge of its property and business and deprive it of the instrumentalities by which it had violated the law and would continue to violate it. This appears more fully in the bill of exceptions (*Rec.* p. 341–342) signed by the judge (p. 349). An order for the appointment of a receiver was made accordingly (*Rec.* p. 327–329), and the receiver qualified by giving bond on the 19th June 1907 (*Rec.* p. 330–332), before which time the defendant had on the 15th June 1907 given a sufficient bond with sureties to supersede the original judgment (*Rec.* p. 320–322).

The defendant appealed from this order and gave a further supersedeas bond (*Rec.* p. 327–329, 349).

The bill of exceptions shows that the judge, in appointing a receiver, proceeded entirely upon the ground that *the judgment* had been rendered establishing the violation of the anti-trust laws by the defendant and that the defendant intended to continue to violate them pending the appeal, and the receiver was appointed for the purpose of giving future effect to the judgment by taking away from the defendant the means of continuing to violate them. So far as this point is concerned, it is unimportant that he may not have had the right to deprive the defendant of its property in order to prevent it from carrying on its business contrary to the statutes. That is what he assumed to do, and the whole ground upon which he assumed to do it was that the judgment established the fact that the defendant had been violating the law and that he had reason to believe that it intended to continue the violation.

If the judgment is reversed, then it would no longer remain an established fact that the defendant had violated the

law, and the ground upon which the receiver was appointed would no longer exist. The order appointing him therefore is dependent on the judgment and must fall with it.

The order appointing the receiver should be reversed even if the original judgment is reversed only as to the penalties, and not as to the cancellation of the permit, for the part of the judgment imposing the penalties is the only part that convicts the defendant of a violation of the law. The part that cancels the permit would by itself only show that the conditions had been broken upon which the defendant had been authorised to do business in the state. The consequence would be that the defendant would be obliged to stop doing business in the state, and there would be no excuse for taking away its property to prevent it from doing business there contrary to the anti-trust laws. So the order appointing the receiver is dependent upon the part of the judgment that imposes the penalties.

The Supreme Court of the State, in determining the question whether the order appointing the receiver was a final order and so subject to appeal, held that it was a final order because it was "*a consequence*" of the complete determination of the controversy (*Rec.* No. 360, p. 75).

In the motion filed by the State in this Court to dismiss the writ of error in the case relating only to the receiver, No. 360, it is said at p. 12,

> "A sworn petition, *whose material allegations were not denied*, was presented to the court. This petition showed every ground which authorised the appointment of a receiver under" the specified statutory provisions.

This is an obvious mistake and overlooks the fact that the answer to this petition says (*Rec.* p. 325),

> "And for answer to said application defendant denies all and singular the allegations therein contained."

The petition alleged (1) the recovery of the judgment, (2) that the charter of the defendant had been forfeited by proceedings in the Missouri courts, (3) that the property of the defendant within the state of Texas was inadequate to pay the judgment and by an act of April 11th 1907 (App. *post* p. 225) the State had a lien on all that property to secure payment of the judgment, and (4) that under the judgment of ouster in the case the defendant had no right to do business in the state and it was necessary to protect the rights of the State that the business should be kept a going concern in the state (*Rec.* p. 323).

The violation of the anti-trust laws as charged in the petition was the only thing that was established by the proceedings and judgment, of which the judge took judicial notice, and upon which, with the information he had got from newspaper accounts of a supposed interview with one of the counsel for the defendant, the judge made the order appointing the receiver. The judge did not even assume to act upon any of the evidence adduced at the trial, but upon the proceedings and judgment. None of the evidence at the trial related to the alleged forfeiture of the charter, or the adequacy of the property of the defendant in the state to pay the judgment, or the necessity of keeping the business in the state a going concern. The judge did not assume to determine new issues upon that evidence without hearing any further evidence. He acted only on the facts already found and the information obtained from the newspapers, the substance of which he stated (*Rec.* p. 341). He even intimated that, as the defendant would undoubtedly supersede the judgment by giving a sufficient bond, he would not have appointed a receiver, if he had not been induced to believe that the defendant intended to continue the violations of law established by the judgment (p. 341). If the judgment is taken away, the violation of the law is not established, and the only ground upon which the judge acted is gone.

Upon the reversal of the judgment, the defendant is entitled to be put in the same position as if there had never been any such judgment, in order that the defendant may "be restored to all things which it hath lost by reason of the said judgment," as prayed at the end of the assignment of errors (*Rec.* p. 1208).

2 Wms. Saund. 101 *gg*.
2 Tidd's Practice (9th ed. 1828) 1186–1187.
Tidd's Forms (1828) 540, 556–558.

Otherwise the defendant would be in the same position as if an order for the issue of an execution was left in force after the judgment of which it was a consequence had been reversed. The order appointing the receiver was in the nature of execution, for according to the judge's statement (*Rec.* p. 341), the purpose of it was, by taking away the property of the defendant, to make effectual in the future the judgment establishing the defendant's violation of the law. If anything had been actually taken away, the defendant would be entitled to restitution. (See notes in 2 Wms. Saund. 101 *gg.;* 2 Tidd Pr. (9th ed. 1828) 1186–1187.)

In ordinary cases, the right to execution or anything consequent upon the judgment would fall as of course with the reversal of the judgment, but the claim expressly asserted by the State, that the order for a receiver should stand notwithstanding the reversal of the judgment, makes it important that the judgment of reversal should extend expressly to that order as well as to the original judgment.

The opinion of the Court of Civil Appeals in the other case (*Rec.* No. 360, p. 57) is not material to the questions in the present case, for it avowedly proceeded on the ground that the court then had before it only a part of the record

of the proceedings in the court below. In the opinion it is said (p. 57),

> "The appellant has seen fit to perfect a separate appeal from the order appointing a receiver, and it has no statement of facts *in the record* showing that the facts which the court took judicial knowledge of did not exist and were not sufficient to authorize the action of the court in making the appointment. The effect of the action of the court was to hold that the facts that he took judicial knowledge of were sufficient to authorize and justify the appointment. *The record here* shows that the State has actually recovered a judgment for penalties and for cancellation of the permit to do business. The *presumption will be indulged* in favor of the action of the trial court, and no fact appearing *in the record brought up here* by the appellant which would negative and destroy the force of this presumption, we must hold that we have *in this record* facts sufficient to justify the judgment below."

In the present case the whole of the proceedings in the District Court upon which the judge acted are set out in the record, and the decision could not be put on the ground that they did not appear. The Court of Civil Appeals refused to consider the question in the present case in which the proceedings *are* set out, on the ground the court had already decided the question in the other case upon a part of the record in which they were *not* set out (*Rec.* p. 1152).

In the motion to dismiss the writ of error in the other case, No. 360, several purposes are mentioned, at p. 10–11, as those for which the receiver was appointed, (1) to preserve the property so that the judgment could be enforced, (2) to enforce the judgment of ouster, (3) to preserve the property for all interested persons.

It has already been shown that the receiver was not appointed for any of those purposes, none of which were considered, but for the sole purpose of preventing the continuation of the violations of law of which the defendant was convicted by the proceedings and judgment.

It is also argued in the motion, p. 11, that there are other statutory grounds upon which the court had authority to appoint a receiver.

If there was any such authority, it was not exercised and none of those grounds were even considered.

It is also asserted in the same motion, p. 12–13, that, irrespective of any questions in the present cases, the judgment of *ouster* will stand, and *it will be necessary and proper* for a receiver to wind up the affairs of the defendant so far as the state of Texas is concerned, and that, even if the defendant should abandon its appeal and pay off the judgment, this would be proper, because it is for the state court to decide upon all questions relating to the disposition of its property and the winding up of its affairs.

It is sufficient to say that a receiver has never been appointed on any such grounds, and the suggestion that a receiver may be necessary in the future for some of those purposes is no reason why this Court should affirm an order appointing a receiver for an entirely different purpose.

But it may be added that neither the Texas statutes nor the principles of equity authorised the appointment of a receiver for any such purposes, and, if any statute purported to authorise such a proceeding, it would be contrary to the Constitution because the defendant would be thereby deprived of its property without due process of law.

As for the judgment of *ouster*, if the defendant's permit is cancelled, it will be obliged to withdraw from the state, but there is no ground upon which it can be required to leave its property there to be disposed of by Texas officials.

If the judgment for the penalties is affirmed, the defendant will have to pay the judgment, and then the whole interest of the State in the property of the defendant will cease, and the defendant will be entitled to depart in peace and take its property with it.

In this action, which is brought by the State to obtain a cancellation of the permit and to recover penalties, the

court has nothing to do with winding up the affairs of the defendant or disposing of its property, except so far as may be necessary to satisfy the claims of the State. If there are other persons having claims against the defendant, they are at liberty to assert them as they may think fit, but it is not for the State to assume to assert such claims, and they are not involved in an action by the State for penalties and cancellation of the permit.

The Texas act of 1907, c. 87 (*post* p. 225), which in s. 1 gives a lien for penalties, and in s. 2 authorises the appointment of a receiver in certain cases, does not purport to authorise such a proceeding for any of those purposes. It is provided in s. 2 that an action against a corporation for any fine, forfeiture, or penalty shall not abate by reason of the dissolution of the corporation or by the forfeiture of its charter, and the section then proceeds (*post* p. 226),

> "Whenever a corporation against which the State has heretofore instituted suit, or shall hereafter institute suit, for forfeiture of its charter, or cancellation of its permit, or for fines or penalties under any law of this State, *shall dissolve* in this or any other State, or shall have a judgment rendered against it in this or any other State, for the *forfeiture of its charter*, the court in this State in which such suit is pending *shall appoint a receiver* for the property and business of such corporation within this State or that may come or be brought within this State during such receivership, *or the court may*, in any case wherein the State is suing any such corporation for the forfeiture of its charter, or of its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation, *whenever the interest of the State* may seem to require such action."

The provision for the appointment of a receiver in case of the *dissolution* of a corporation or the *forfeiture of its charter* while an action against it is pending, is evidently intended to provide a means of enabling the State to proceed to judgment and enforce the penalties notwithstand-

ing the corporation may have ceased to exist by reason of its dissolution or the forfeiture of its charter. This provision was probably suggested by the dissolution of the *old* Waters-Pierce Co. in 1900 and the consequent abatement of an action against it for penalties, as stated in the answer in the present case (*ante* p. 8; *Rec.* p. 85, 95–96). It does not apply to the present case, for the defendant has not been dissolved or forfeited its charter.

The subsequent provision, that the court *may* appoint a receiver *whenever the interest of the State* may seem to require such action, makes it necessary that the State have some interest in the property of the corporation, in order to justify the appointment of a receiver. The State can have no interest in the property of the defendant after the penalties are paid.

Even in the case of the *dissolution* or the *forfeiture of the charter* of a corporation, this statute would give no authority for the appointment of a receiver, except for the enforcement of penalties, and this is the whole object of the statutory provision.

If the statute assumed to go further and to authorise the appointment of a receiver on the application of the State for the purpose of winding up the affairs of a corporation of another State, it would be contrary to the Constitution, for the State would have no interest in the property or affairs of such a corporation and the proceeding would deprive it of its property without due process of law.

Greenwood v. *Freight Co.* 105 U. S. p. 19.
People v. *O'Brien*, 111 N.Y. p. 47–48, 63.

13. *Appointment of a Receiver after the Supersedeas.*

Even if the original judgment should not be reversed, it is submitted that the judge had no authority to complete the appointment of the receiver after the original judgment had been superseded, and that the order completing such appointment deprived the defendant of its property without due process of law.

This is not a merely formal objection, but is a substantial one. For, if the judge had no authority to complete the appointment while the appeal from the original judgment was pending, there will never be any occasion for his doing so, as the defendant has given a supersedeas bond in the sum of $3,275,000 (*Rec.* p. 320–322) and there is no question that the judgment will be paid if it is affirmed. But, if the appointment of the receiver is held to be in force, the State will claim the right to put the receiver in possession under it, whether the judgment is paid or not. The right to do so is insisted on in the motion to dismiss the writ of error in the other case, p. 13.

This objection is assigned as error in this Court (*ante* p. 77, par 25; *Rec.* p. 1206) and in the courts below (*Rec.* p. 382, par. 291) and by the exceptions taken by the defendant to the action of the judge in completing the appointment of the receiver (*Rec.* p. 348–349).

The appointment of the receiver was made on the 13th June 1907 and was conditional upon his giving security in the sum of $250,000 (*Rec.* p. 328). This security was given on the 19th June (*Rec.* p. 330–332) and before that time the defendant had on the 15th June given the bond necessary to supersede the original judgment (*Rec.* p. 320–322).

The appointment of the receiver was not complete and he was not legally clothed with that character until he had given the security.

Kerr on Receivers (3rd ed.) 128, 130.

It has already been shown that the receiver was appointed only on the ground that the original judgment established that the defendant had violated the anti-trust laws and for the purpose of preventing a continuance of that violation. As soon as the judgment had been superseded, it could no longer be considered as establishing any such violation of law. It was as if it had never been entered, so long as the appeal was pending. The defendant denied that what it had been doing was any violation of the law, and gave the supersedeas bond for the purpose of getting rid of all effects of the judgment during the pendency of the appeal. The judge would have had no right, after the supersedeas, to appoint the receiver on the ground that there had been such a judgment, and he had no right to go on and complete the appointment afterwards.

The Supreme Court of the State has held in this very case that the effect of a supersedeas is absolute and suspends all action of the court upon the judgment. In the opinion printed with the record in the other case (*Rec.*, No. 360, p. 77), after quoting the statute, the court says,

> "This is plain language that cannot be misconstrued, because its meaning is as definite as could be expressed to the effect that, when the appellant or plaintiff in error complies with the law, the judgment cannot be enforced during the pendency of the appeal. It only needs to be said that the law applies to this case and the enforcement of the order appointing the receiver was suspended by the appeal. . . .
>
> "This court has no power to direct or authorise Eckhardt to take charge of the property of the defendant company, when the statute expressly provides that the giving of the appeal bond shall suspend the action of the court in that regard. If the appeal did not have the effect to suspend the execution of the

order, the judge had authority to limit the appointment as he did by his order," &c.

This is equally applicable to completing the appointment of the receiver after the judgment upon which the appointment was dependent had been suspended by the appeal.

A supersedeas "stops all sort of proceedings."

Smith v. *Nicholson*, 2 Stra. 1186.

Sampson v. *Brown*, 2 East 439.

So, by the laws of Texas, as declared by its Supreme Court, the judge had no authority to go on and complete the appointment of the receiver after the original judgment had been superseded. In doing so he acted arbitrarily and without authority of law, and, if the appointment is allowed to be put in force, the defendant will be deprived of its property without due process of law.

The judge and officers of the court in completing the appointment of the receiver acted as representatives of the State, and their acts were those of the State.

Scott v. *McNeal*, 154 U. S. p. 45.

Waterworks Co. v. *Owensboro*, 200 U. S. p. 45.

Londoner v. *Denver*, 210 U. S. p. 386.

14. *The Receiver appointed arbitrarily and without Due Process of Law.*

The objection is assigned as error in this Court, that the judge arbitrarily appointed the receiver under color of the statute of 1907, c. 87 (*post* p. 226) for the purpose of depriving the defendant of its property and business and for the pretended purpose of preventing the defendant from a continued violation of the law, and not for any purpose authorised by the statute, and that the defendant was thereby deprived of its property without due process of law contrary to the Constitution (*ante* p. 77, par. 26; *Rec.* 1207).

The grounds upon which the judge assumed to appoint a receiver have been mentioned (*ante* p. 191–192) as they appear in the bill of exceptions (*Rec.* p. 341–342).

The appointment of the receiver on such grounds was assigned as error in the court below as contrary to the 14th amendment of the Constitution (*Rec.* p. 383, par. 297).

The judge did not make the appointment upon any of the grounds alleged in the application (*Rec.* p. 323), which are briefly mentioned *ante* p. 194.

It was objected by the defendant that those grounds were insufficient in law, and the defendant also denied all the allegations (*Rec.* p. 325).

At the hearing of the application, as soon as the insufficiency had been argued by counsel for the defendant, the judge announced that it was unnecessary for him to hear counsel for the State, and that he should take judicial notice of the proceedings and judgment by which the defendant had been convicted of violating the anti-trust

laws on every day from the 1st June 1900 to the 29th April 1907 (*Rec.* p. 341).

A bond in the sum of $3,275,000, with the American Surety Co. as surety, to supersede proceedings on the original judgment, had already been offered but not accepted (*Rec.* p. 338–339). The only substantial difference between this bond and the one afterwards accepted was that an individual was joined as an additional surety (p. 345–348).

The judge stated that he would assume that a proper supersedeas bond would be given, but, notwithstanding the defendant's right to give such a bond, he was of the opinion that the legislature had provided, as a means of preventing the defendant from a continued violation of the law, that a receiver should be appointed to take charge of its property and business and *deprive it of the instrumentalities* by which it had violated and would continue to violate the law; and that *because* of the statute and the declared purpose of the defendant, speaking through its general counsel, "*in newspaper interviews* which had been brought to the attention of the court," to appeal from the judgment and continue to carry on its business in the same manner as before "*notwithstanding such judgment of conviction;*" and without requiring the State to prove any of its allegations or permitting the defendant to disprove them or the facts assumed by the judge upon the newspaper statement, the judge announced that he would appoint a receiver as prayed (*Rec.* p. 341–342).

It is plain, from this statement of his reasons, that the judge did not proceed upon any of the grounds alleged in the petition. He did not appoint the receiver for the purpose of protecting the interest in the property of the defendant that the State had acquired by means of the judgment. He declared in substance that that was unnecessary, because the payment of the judgment was about to be secured by a proper supersedeas bond, as it was in fact secured before the appointment of the receiver

was completed. All right of enforcing or protecting the interest of the State in the property by reason of its lien for the judgment, was thereby superseded as effectually as if the right were derived from an attachment or an execution. No inquiry was had as to the existence of any of the other grounds alleged, and the proceedings and judgment of which he took judicial notice contained no evidence in support of any of the allegations.

The proceedings and judgment established (until the supersedeas bond was given) that the defendant had violated the anti-trust laws during the period mentioned by the judge. But it was the *supposed intention* of the defendant to continue those violations that was the ground of his decision to appoint a receiver.

In deciding that this intention existed, the judge proceeded without any trial or evidence, stating that his information regarding the existence of the intention had been derived from newspaper accounts of a supposed interview. This statement was made only in the announcement of his decision. There was no inquiry whether in fact any such interview had taken place and there was no opportunity to contradict the newspapers. Even the newspapers containing the information were not produced in court. The judge satisfied himself as to the existence of the intention before he came into court.

It is submitted that these proceedings were not conducted according to the regular course of procedure, or in accordance with the declared law of the state, or with full opportunity for the defendant to be heard. There was no opportunity to be heard on the question of the existence of the intention, or on that of its materiality. There was no evidence whatever of its existence.

If there had been a hearing, the defendant might have shown, not only that such an intention had never been

expressed, but that it was an impossible one in view of the existing laws. For by two statutes passed in April and May 1907 it was in substance made a felony for any person to act as an agent or employee of any corporation carrying on business in violation of the anti-trust laws, and this was punishable by imprisonment in the penitentiary for not less than *two years* nor more than *ten years* (General Laws 1907, p. 322, 456). These statutes were made the ground of a subsequent application by the state attorney-general to the Supreme Court of the state to put the receiver in possession, after his appointment had been superseded (*Rec.* No. 360, p. 64–66). They would have made it impossible for the defendant to procure employees for the purpose of carrying on its business, while it was uncertain whether the judgment would be reversed or affirmed.

This was pointed out by Bryant J. in a judgment printed in the record in *Palmer* v. *Texas*, No. 535 Oct. Term 1907 of this Court, at p. 209, and in a foot-note to the same case in 158 Fed. R. p. 719–720.

The object of appointing the receiver was to deprive the defendant of its property, viz., "to take charge of *its property and business* and *deprive it of the instrumentalities* by which it had so violated the law and would continue to violate the law" (*Rec.* p. 341).

This was depriving the defendant of its property without due process of law.

In the motion of the State to dismiss the writ of error in No. 360, it is asserted (at p. 11) that this was not *taking property* or *depriving anyone of property*, but *preserving it* to await the future action of the proper tribunals.

But it appears from the bill of exceptions (*Rec.* p. 341–342) that the receiver was not appointed for the purpose of *preserving* the property pending litigation in regard to it, but for the avowed purpose of *depriving* the defendant

of it and so preventing the defendant from carrying on its business, as the judge assumed that it was going to do.

An order appointing a receiver to preserve the property pending the litigation would have been an interlocutory order, which the Supreme Court of the state has decided that this was not. In the opinion already referred to that court says (*Rec.* No. 360, p. 75),

> "The order clearly comes within the definition of a final decree or order, for so far as the defendant was concerned, it finally disposed of the matter then before the court, which was the appointment of a receiver to take the property into his custody as a consequence of the complete determination of the controversy."

There is in the order no limitation of the time during which the receiver is to remain in possession, and none can be implied from the purposes for which he was appointed. In the motion to dismiss (p. 13) it is asserted that the defendant would not be entitled to a return of its property, even if it paid off the judgment. It is evident that the State does not mean that the property shall ever go back to the defendant if it can be once got into the hands of the receiver.

Even if the deprivation of property can be considered as in some way limited in point of time, still it would be a deprivation of property without due process of law. The provision of the Constitution does not allow a state to deprive a person either of his liberty or of his property, even for a limited time, without due process of law.

The extraordinary character of the judge's action is emphasised by the order he made for suspending the proceedings in regard to the receiver. The order was (*Rec.* p. 329) that, upon the defendant's giving a sufficient bond in the sum of $100,000 with the condition to be mentioned, further proceedings should be suspended pending appeal from the order appointing a receiver. This order is re-

ferred to by the Supreme Court (*Rec.* No. 360, p. 78) as operating independently of the statutory provisions for superseding proceedings upon the order. The condition of the bond (*Rec.* p. 349, 351) was only that the defendant, in case the judgment on appeal should be against it, should perform the judgment and pay all damages awarded and pay the value of the rent or hire of the property. There was no provision against a continuation of any violations of law.

But on the 15th June 1907, when this order for suspending the proceedings as to the receiver was made, the defendant had already on the same day given a bond in the sum of $3,275,000 to supersede the original judgment (*Rec.* p. 320–322). The security for payment of that judgment was already much more than sufficient, and was not really increased by the additional bond for $100,000 with the same sureties. There was however no security against the defendant's continuing its business, which was the alleged purpose of appointing the receiver.

These circumstances should be considered in connection with the question whether the original appointment of the receiver was made according to due process of law.

Disposition of the principal Case No. 359.

It is submitted that judgment should be entered in this case, reversing the judgment of the Court of Civil Appeals, and remitting the cause to that court with directions to reverse the original judgment of the District Court and the orders of that court relating to the receiver with costs.

Disposition of the other Case No. 360.

If the motion of the defendant to consolidate this case with the principal case is granted, the judgment will naturally follow the disposition already suggested as regards the principal case, viz., that the judgment of the Court of Civil Appeals be reversed and the cause remitted to that Court with directions to reverse the orders of the District Court relating to the receiver with costs.

If however the motion to consolidate should not be granted, still it is submitted that the same disposition should be made of the case.

The grounds upon which the judge appointed the receiver are set out in the bill of exceptions, which is part of the record in that case (*Rec.* No. 360, p. 19–20). The only purpose for which the judge took judicial notice of the proceedings and judgment in the principal case was to ascertain that the violations of the anti-trust laws by the defendant had been thereby established. That is the plain

meaning of the bill of exceptions. The newspapers furnished the ground of his belief that the defendant intended to continue the violations of law. It is also set out in the bill of exceptions that the defendant appealed from the original judgment on the 7th June 1907 (*Rec.* No. 360, p. 17) and that its supersedeas bond was approved (p. 24) on the 15th June 1907 (p. 26), and that the receiver's bond was afterwards received and approved on the 19th June 1907, the defendant objecting and excepting thereto (p. 27).

It thus appears in that record that the appointment of the receiver was completed after the original judgment had been superseded, which is the objection above considered under **13** (*ante* p. 200).

All the circumstances referred to under **14** (*ante* p. 203), as showing that the judge acted arbitrarily and without due process of law in appointing the receiver, appear in the same bill of exceptions.

The other ground for reversing the orders relating to the receiver, considered under **12** (*ante* p. 188), is that the order appointing the receiver should fall with the original judgment, if that is reversed. That is something that cannot appear in the record until it is done. But the judge in appointing the receiver took judicial notice of the original judgment, and, if he could take judicial notice of that fact by looking into the record of his own court, it is submitted that this Court can look into its own record for the purpose of ascertaining that the judgment is reversed, and can then reverse the order appointing the receiver on the ground that the judgment upon which it is dependent no longer exists.

In *Farmers & Merchants Bank* v. *Waco Electric Co.*, 89 Tex. 331, where there had been two appeals by different parties and separate transcripts filed in the Court of Civil Appeals, it was held by the Supreme Court that there was only one case in the appeal court, notwithstanding there

were two records, and that it should be dealt with accordingly. The court said (p. 332),

> "Two appeals in the same case do not make two cases. Here there was but one case in the appellate court, as there was in the trial court; and it should be so treated by the former court, whenever their attention is called to the fact."

It is submitted that it should be treated in the same way in this Court although the Court of Civil Appeals disregarded the rule so laid down and saw fit to advance the appeal regarding the receiver (*Rec.* No. 360, p. 55) and to decide it upon the ground that the *part of the record* then before the court did not contain all the matters upon which the judge had proceeded (p. 57), and afterwards to make this decision an excuse for not considering the question when the *whole record* came before it with both appeals (*Rec.* No. 359, p. 1152).

MOORFIELD STOREY.
J. L. THORNDIKE.

APPENDIX

TEXAS "ANTI-TRUST LAWS"

ACT of 1899, c. 146, approved 25th May 1899 (Gen. Laws 1899, p. 246), entitled,

An Act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles; to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violates the terms of this act, and to authorize the institution of prosecutions and suits therefor.

Be it enacted by the Legislature of the State of Texas:

Section 1. Any *corporation* organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this state, or any partnership, or individual, or other association of persons whatsoever, *who shall* create, *enter into*, *become* a member of or *a party to* any pool, trust, *agreement*, combination, confederation or *understanding* with any other corporation, partnership, individual or any other person or association of persons, *to regulate or fix the price* of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, *or to maintain* said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation *to fix or limit the amount* or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a *conspiracy to defraud*, and to *be subject to the penalties* as provided by this act.

Sec. 2. A "*monopoly*" is any *union or combination* or consolidation or affiliation of *capital*, credit, property, assets, trade, custom, skill or acts, or of any other valuable thing or possession, by or between *persons, firms or corporations*, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or *sought to be* accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are *reasonably calculated to be* produced; and a "monopoly," as thus defined and contemplated, includes not merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade, or other valuable thing or possession, whether *effected* by the *ordinary methods of partnership* or by actual union under the legal form of a *corporation* or an incorporated body resulting from the union of one or more distinct firms or corporations, or *by the* purchase, *acquisition* or control of *shares or certificates of stock or bonds*, or other corporate property or franchises, and *all corporations or partnerships* that *have been* or *may be* created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this act, *if so created or entered* into for any one or more of *the purposes named* in this act; and a "monopoly," as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or association of persons *engaged therein* shall be deemed and adjudged guilty of a *conspiracy to defraud*, and shall *be subject to the penalties* prescribed in this act.

Sec. 3. If any person, persons, company, partnership, association or corporation engaged in the manufacture of any article of commerce or consumption from the raw material produced or mined in this State, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell at less than the cost of manufacture, or give away their manufactured products, for the purpose of driving out competition or financially injuring competitors engaged in the manufacture and refining of raw material in this State, said person, persons, company, partnership, association or corporation resorting to this method of securing a monopoly in the manufacture, refining and sale of the finished product produced or mined in this State, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction shall be subject to the penalties of this act.

Sec. 4. If any person, persons, company, partnership, association, corporation or agent engaged in the manufacture or sale of any article of commerce or consumption produced, manufactured or mined in this State or elsewhere, shall, with the intent or purpose of driving out competition, or for the purpose of financially injuring competitors, sell within this State at less than cost of manufacture or production, or sell in such a way, or give away within this State, their products for the purpose of driving out competition or financially injuring competitors engaged in similar business, said person, persons, company, partnership, association, corporation or agent resorting to this method of securing a monopoly within this State in such business, shall be deemed guilty of a conspiracy to form or secure a trust or monopoly in restraint of trade, and on conviction thereof shall be subject to the penalties of this act.

Sec. 5. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than *two hundred dollars* nor more than *five thousand dollars* for every such offence, and *each day* such person, corporation, partnership or association shall continue to do so shall be a separate offence, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.

Sec. 6. If any two or more persons or corporations who are engaged in buying or selling any article of commerce, manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining or any article or thing whatsoever, shall enter into any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing; or to limit competition in such trade by refusing to buy from or sell to any other person or corporation any such article or thing aforesaid, for the reason that such other person or corporation is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding; or shall boycott or threaten any person or corporation for buying from or selling to any other person or corporation who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding any such article or thing aforesaid, it shall be a violation of this act; and any person, firm, corporation or association of persons committing such violation shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

Sec. 7. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the

preceding sections of this act, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in the State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other State or country, which shall violate any of the provisions of the preceding sections of this act shall thereby forfeit its right and privilege thereafter to do any business in this State, and upon proper proof being made thereof in any court of competent jurisdiction in the State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in transacting its business in this State, has been, while acting as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act, shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, to the Commissioner of Insurance, Statistics and History of the State, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation.

Sec. 8. It shall be the duty of the Secretary of State, on or about the first day of July of each year, and at such other times as he shall deem necessary, to address to the president, secretary or treasurer of each incorporated company doing business in this State a letter of inquiry as to whether the said corporation has all or any part of its business or interest in or with any trust, combination or association of persons or stockholders, as named in the preceding provisions of this act, and to require an answer under oath of the president, secretary or treasurer, or any director of said company. A form of affidavit shall be enclosed in said letter of inquiry, as follows:

Affidavit.

STATE OF TEXAS,

County of .....

I,.....do solemnly swear that I am the.....(president, secretary, treasurer or director) of the corporation known and styled....., duly incorporated under the laws of....., on the..... day of....., 19...., and now transacting or conducting business in the State of Texas, and that I am duly authorized to represent said corporation in making this affidavit, and I do further solemnly swear that the said....., known and styled as aforesaid, has not since the.....day of

.....(naming the day upon which this act takes effect), created, entered into or become a member of or a party to, and was not, on the.....day of.....; nor at any day since that date, and is not now a member of or a party to any pool, trust, agreement, combination, confederation or understanding, with any other corporation, partnership, individual, or any other person, or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid; and that it has not entered into or become a member of, or a party to, any pool, trust, agreement, contract, combination or confederation, to fix or limit the amount of supply or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, or any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by the parties aforesaid, and that it has not issued, and does not own any trust certificates for any corporation, agent, officer or employe, or for the directors or stockholders of any corporation, has not entered into, and is not now in any combination, contract or agreement with any person or persons, corporation or corporations, or with any stockholders, or directors thereof, the purpose and effect of which said combination, contract or agreement would be to place the management or control of such combination or combinations, or the manufactured product thereof, in the hands of any trustee or trustees, with the intent to limit or fix the price, or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict, or diminish the manufacture or output of any such article; that it has not entered into any conspiracy, defined in the preceding sections of this act, to form or secure a trust or monopoly in restraint of trade; that it has not been since January 31, A.D. 1900, and is not now a monopoly by reason of any conduct on its part which would constitute it a monopoly under the provisions of Sections 2, 3, 4, 5, 6, 10 and 11, of this act, and is not the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw material or preparing the same for market by any wrapping, baling or other process, and while leasing, renting or operating the same refuses or fails to put the same on the market for sale; that it has not issued, and does not own any trust certificates, and has not, for any corporation or any agent, officer or employe thereof, or for the directors or stockholders thereof, entered into, and is not now in any combination, contract or agreement with any person or persons, corporation

or corporations, or with the stockholders, directors or any officer, agent or employe of any corporation or corporations, the purpose and effect of which combination, contract or agreement would be a conspiracy to defraud, as defined in Section 1 of this act, or to create a monopoly, as defined in Sections 2, 3, 4, 5, 6, 10 and 11 of this act.

.....

(President, Secretary, Treasurer or Director.)

Subscribed and sworn to before me, a.....within and for the county of....., this .....day of ....., 19.....

(Seal) .....

And on refusal to make oath, in answer to said inquiry, or on failure to do so within thirty days from the mailing thereof, such failure shall be prima facie proof that such incorporated company is transacting business in the State of Texas, and has violated the provisions of this act, every day after the expiration of thirty days from the mailing of said letter of inquiry, the Secretary of State shall certify to the prosecuting attorney of the district or county wherein said corporation is located, and it shall be the duty of such prosecuting attorney, at his earliest practicable moment, in the name of the State, and at the relation of said prosecuting attorney, to proceed against such corporation, if a domestic corporation for the recovery of the money forfeit provided for in this act, and also for the forefeiture of its charter or certificate of incorporation. If a foreign corporation, to proceed against such corporation for the recovery of the money forfeit provided for in this act, and to forfeit its right to do business in this State; and provided, that whatever money, bonds, or other securities may be on deposit in this State shall remain subject to the decision of said court to secure whatever penalties or costs may be adjudged against said corporation or individual. It is provided, however, that all parties making the affidavit provided for in this section shall be exempt from criminal prosecution for any violation of law that may be disclosed by such affidavit. It is further provided, that the Secretary of State shall, from time to time, when he may have reason to believe that individuals or partnerships are doing business in this State in violation of this act, address the letter of inquiry herein provided for to such individuals or partnerships and require of them the same answers under oath prescribed in this section for the officers of corporations, the affidavit to which must be made by the individual addressed, or some member of the partnership addressed; the form of affidavit herein prescribed, with such changes as may be necessary to make it

applicable to individuals and partnerships shall be inclosed in said letter of inquiry.

Sec. 9. It shall be the duty of the Attorney-General and the prosecuting attorney of each district or county, respectively, to enforce the provisions of this act. The Attorney-General and the prosecuting attorney shall institute and conduct all suits begun in the district courts, and upon appeal the Attorney-General shall prosecute said suits in the courts of Civil Appeals and Supreme Court. The prosecuting attorney shall receive for his compensation one-fourth of the penalty collected; provided, the fees allowed the prosecuting attorney representing the State, provided for in the section, shall be over and above the fees allowed him by the general fee bill now in force.

Sec. 10. All actions authorized and brought under this act shall have precedence on motion of the prosecuting attorney or Attorney-General of all other business, civil and criminal, except criminal cases where the defendants are in jail.

Sec. 11. Each corporation, co-partnership, firm or individual who may be the owner or lessee of a patent to any machinery intended, used or designed for manufacturing any raw materials or preparing the same for market by any wrapping, baling or other process, who shall lease, rent or operate the same in their own name and refuse or fail to put the same on the market for sale, shall be adjudged a monopoly, and be subject to all the pains and penalties provided in this act.

Sec. 12. The sale, delivery or disposition of any of the articles, commodities or things hereinbefore mentioned by any individual, company or corporation transacting business contrary to the provisions of this act, within this State or elsewhere, is hereby declared to be unlawful and contrary to public policy, and the purchaser of any article or commodity from any such offending individual, company or corporation shall not be liable for the price or payment thereof, and may plead this act as a defence to any suit for the price or payment, whether the purchase was made directly from the individual, company or corporation so unlawfully transacting business, or indirectly from one who acted for such individual, company or corporation as agent, representative, solicitor or canvasser; and provided further, that where any money or other thing of value is paid to such individual, company or corporation so unlawfully transacting business, its agent, representative, solicitor or canvasser, the person so paying the same may recover back the amount of the money or the value of the thing so paid.

Sec. 13. The following corporations, co-partnerships, firms or individuals are also adjudged a monopoly, and subject to all the pains and penalties provided in this act:

Every corporation, co-partnership, firm or individual which may

gather items of news or press dispatches for sale to newspapers and which shall refuse to sell said items of news or press dispatches to more than one newspaper to a stated number of inhabitants in any city, town or subdivision of the State of Texas, or within a certain radius of territory. Every association of newspapers formed for the purpose of exchanging items of news and press dispatches which may require of its members under pain of forfeiting their membership, that they do not sell to or exchange with newspapers not members of said association any items of news or press dispatches.

Sec. 14. The provisions of the foregoing sections, and the pains and penalties provided for for violations of this act shall be held and construed to be cumulative to all laws now in force in this State. And provided that the provisions of this act shall not exempt from punishment or forfeiture any person, firm, association of persons or corporation, who may have violated or offended against any law now in existence that may be or may be construed to be repealed by this act or in conflict herewith. And provided further, that nothing in this act shall be deemed or construed to affect any suits or prosecutions now pending or hereafter to be instituted upon any cause of action, forfeiture or penalty accruing or to accrue prior to the date of the taking effect of this act, but all such rights to maintain, institute or prosecute all such causes of action are hereby reserved to the State, in the same manner and with the same effect as if this law had not been passed; provided further, that this act shall take effect from and after January 31, A.D. 1900.

Sec. 15. The near approach of the end of the session, and the fact that we now have no adequate anti-trust law upon the statutes, and the importance of such legislation, create an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and it is so enacted.

ACT of 1903, c. 94, approved 31st March 1903 (Gen. Laws 1903, p. 119) entitled,

An Act to define, prohibit and declare illegal, trusts, monopolies and conspiracies in restraint of trade, and to prescribe penalties for forming or being connected with such trusts, monopolies and conspiracies, and to provide for the suppression of the same and to promote free competition in the State of Texas, and to repeal all laws in conflict therewith.

Section 1. Be it enacted by the Legislature of the State of Texas: That *a trust* is a *combination of capital*, skill or acts by *two or more*

persons, firms, corporations or associations of persons, or either two or more of them for either, any, or all of the *following purposes:*

1. To create or *which may tend* to create or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.

Sec. 2. That *a monopoly* is a *combination* or consolidation *of two or more corporations* when effected in either of the following methods:

1. When the *direction of the affairs* of two or more corporations is in any manner *brought under the same management or control* for the purpose of producing, or *where* such common management or control *tends* to create a trust as defined in the first section of this Act.

2. Where *any corporation acquires* the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition *tends* to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

Sec. 3. That either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations, or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

Sec. 4. Any and all trusts, monopolies and conspiracies in restraint of trade as herein defined, are hereby prohibited and declared to be illegal.

Sec. 5. Any corporation holding a charter under the laws of the State of Texas, which shall violate any of the provisions of this Act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

Sec. 6. For a violation of any of the provisions of this Act by any corporation mentioned herein, it shall be the duty of the Attorney-General, upon his own motion, and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis County, at Austin, or at the country seat of any county in the State, where such corporation exists, does business, or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

Sec. 7. When a corporation organized under the laws of this State shall have been convicted of a violation of any of the provisions

of this Act, and its charter and franchise has been forfeited, as provided in section 5, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas.

Sec. 8. Every foreign corporation violating any of the provisions of this Act is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the district court of Travis County, in the name of the State of Texas.

Sec. 9. The provisions of Chapter 92 of the Revised Statutes of this State of 1895, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this Act.

Sec. 10. When any foreign corporation has been convicted of a violation of any of the provisions of this Act, and its right to do business in this State has been forfeited, as provided in Section 8 of this Act, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas.

Sec. 11. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this Act shall for *each and every day* that such violation shall be committed or continued, *forfeit and pay* the sum of *fifty dollars*, which may be recovered in the name of the State of Texas in any county where the offence is committed or where either of the offenders reside, or in Travis County, and it shall be the duty of the Attorney-General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this Act shall be over and above the fees allowed him under the general fee bill.

Sec. 12. Any contract or agreement in violation of the provisions of this Act shall be absolutely void and not enforceable either in law or equity.

Sec. 13. And in addition to the penalties and forfeitures herein provided for, every person violating this Act may further be punished by *imprisonment in the penitentiary* not less than one nor more than ten years.

Sec. 14. In prosecutions for the violation of any of the provisions of this Act, evidence that any person has acted as the agent of a corporation in the transaction of its business in this State shall be received as prima facie proof that his act in the name, behalf or

interest of the corporation of which he was acting as the agent, was the act of the corporation.

Sec. 15. Upon the application of the Attorney General, or of any district or county attorney, made to any justice of the peace in this State, and stating that he has reason to believe that a witness, who is to be found in the county of which such justice of the peace is an officer, knows of a violation of any of the provisions of this Act, it shall be the duty of the justice of the peace to whom such application is made, to have summoned and to have examined, such witness in relation to violations of any of the provisions of this Act, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn and the justice of the peace shall cause the statements of the witness to be reduced to writing and signed and sworn to before him, and such sworn statement shall be delivered to the Attorney General, district or county attorney upon whose application the witness was summoned. Should the witness summoned, as aforesaid, fail to appear, or to make statement of the facts within his knowledge under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person so summoned and examined shall not be liable to prosecution for any violation of the provisions of this Act about which he may testify fully and without reserve.

Sec. 16. All actions authorized and brought under this Act shall have precedence, on motion of the prosecuting attorney or the Attorney General, of all other business, civil and criminal, except criminal cases where the defendants are in jail.

Sec. 17. That all laws and parts of laws in conflict with this Act be and the same are hereby repealed, and that Title CVIII of the Revised Civil Statutes of the State of Texas of 1895, and articles 5313, 5314, 5315, 5316, 5317, 5318, 5319, 5320, 5321, and 5321a, thereof, be and the same are hereby expressly repealed; and that articles 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 988a, 988b, 988c, 988d, of Chapter 7, in Title XVIII, of the Penal Code of the State of Texas of 1895, be and the same are hereby expressly repealed; and that an Act entitled "An Act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this Act," approved April 30, 1895, and known and published as Chapter 83 of the General Laws of the Twenty-fourth Legislature, be and the same is hereby expressly repealed; and that An Act entitled "An Act to prohibit pools, trusts,

monopolies and conspiracies to control business and prices of articles, to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this Act, and to authorize the institution and prosecution of suits therefor," approved May the 25th, 1899, and published and known as Chapter CXLVI of the General Laws of the Twenty-sixth Legislature, be and the same are hereby expressly repealed; and that An Act entitled "An Act to amend Article 5318, Title 108, of the Revised Civil Statutes of the State of Texas, prescribing penalties against trusts and conspiracies against trade," approved June 5th, 1899, and known as Chapter CLXXII of the General Laws of the Twenty-sixth Legislature, be and the same is hereby expressly repealed; provided nothing in this Act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this Act takes effect.

Sec. 18. The fact that the anti-trust laws enacted by the Legislature of the State of Texas in 1895 have been held to be unconstitutional, creates an emergency and imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended and that this Act take effect and be in force from and after its passage, and it is so enacted.

ACT of 1907, c. 87, approved 11th April 1907 (Gen. Laws 1907, p. 175), entitled,

An Act relating to fines, penalties and forfeitures due or to become due to the State of Texas by foreign or domestic corporations; to provide for the securing and enforcement of payment thereof; *to fix liens* upon the property of such corporation to secure payment thereof; to provide for the survival of actions and causes of action in case of the dissolution or forfeiture of charter or cancellation of permits of such corporation; to provide for the *appointment of receivers;* fixing venue; providing that this act shall be cumulative of all other laws in force in this State, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, including any law against trusts, monopolies and conspiracies, or combinations or

contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for all costs of suit and of collection, and the State of Texas shall have *a lien* on all such property from the date that suit shall be instituted by the Attorney General or District or County Attorney acting under his direction in any court of competent jurisdiction within this State for the purpose of forfeiting the charter or cancelling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture shall constitute notice of such lien. Where any such law has heretofore been violated, or shall be violated before the taking effect of this act, and a cause of action exists for such fine, penalties or forfeiture, or shall come into existence before the taking effect of this act, and suit shall be filed in such case, the State shall have *a lien* to secure the payment of such fine, penalties and costs from the time this act shall take effect on all property of such corporation within this State or which shall thereafter become or be brought within the State.

Sec. 2. Any action or cause of action for any fine, forfeiture or penalty that the State of Texas has or may have against any corporation chartered under the laws of this or any other State, Territory or Nation, shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter. *Whenever a corporation* against which the State has heretofore instituted suit, or shall hereafter institute suit, for forfeiture of its charter, or cancellation of its permit, or for fines or penalties under any law of this State, *shall dissolve* in this or any other State, or shall have a judgment rendered against it in this or any other State, for the *forfeiture of its charter*, the court in this State in which such suit is pending *shall appoint a receiver* for the property and business of such corporation within this State or that may come or be brought within this State during such receivership, *or the court may*, in any case wherein the State is suing any such corporation for the forfeiture of its charter, or of its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation, *whenever the interest of the State* may seem to require such action. If such dissolution shall take place or judgment of forfeiture be rendered against such corporation before this act takes effect, the court shall, upon the taking effect of this act, appoint a receiver for the property and business of such corporation in this State; and the State shall have the right to the writs of attachment, garnishment, sequestration or injunction, without bond, to aid in the enforcement of its rights created by this act; and all property that may come into the possession of any receiver appointed under the provisions

of this act, not otherwise exempt by law, shall be subject to the lien herein created, and for the payment of any such fine or penalty.

Sec. 3. The Attorney General, or any District or County Attorney acting under his direction, may bring suit in the name of the State of Texas for the foreclosure of such lien in the District Court of any County in the State of Texas, and in case the suit for foreclosure should be brought against any corporation which has dissolved or had a judgment for the forfeiture of its charter or the cancellation of its permit rendered against it, pending any suit by the State of Texas against such corporation for the forfeiture of its charter or cancellation of its permit or for penalties or fines, service may be had upon any person within this State who acted and was acting as agent of any such corporation in this State at the time of such dissolution or forfeiture of charter or cancellation of permit.

Sec. 4. The rights and remedies given by this act shall be construed as cumulative of all other laws in force in this State, and shall not affect, change or repeal any other remedies or rights now existing in this State for the enforcement, payment or collection of fines, penalties and forfeitures.

Sec. 5. In case any suit should heretofore be brought in any of the courts of this State for the recovery of penalties mentioned in this act, the same shall not be settled or compromised without trial upon the merits thereof without the consent and approval of the Attorney General of the State.

Sec. 6. The fact that there is no law that prevents the abatement of actions or causes of action for fines and penalties when corporations becoming liable for same shall dissolve or be dissolved by the forfeiture of their charters, or cancellation of their permits, and the fact that there is no adequate remedy for the collection and enforcement of such fines and penalties, creates an emergency and an imperative public necessity demanding that the Constitutional rule requiring bills to be read on three several days in each house be suspended, and it is so suspended, and that this act shall take effect and be in force from and after its passage, and it is so enacted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

WATERS-PIERCE OIL COMPANY,
Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.
} No. 360.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1908.

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Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.
No. 360.

BRIEF FOR THE STATE OF TEXAS, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On September 22, 1906, the State of Texas brought a suit against the Waters-Pierce Oil Company, a corporation created under the laws of the State of Missouri, having the privilege of doing business in the State of Texas for ten years, from the 31st day of May, 1900, by virtue of a permit issued by the State of Texas on the last mentioned date.

The purposes of the suit were to recover penalties from and cancel the permit of the Waters-Pierce Oil Company for alleged violations of the laws of the State of Texas against conspiracies, combinations and agreements in re-

straint of trade, commonly known as the "anti-trust" laws of the State, it being alleged that the Waters-Pierce Oil Company had violated two statutes of the State, one of which was in force at the date of the granting of the above-mentioned permit (known as the act of 1899), and the other of which took effect on March 3, 1903 (known as the act of 1903).

The suit was tried resulting in a verdict and judgment on the 1st day of June, 1907, which verdict and judgment found and adjudged the Waters-Pierce Oil Company guilty of violating each and both of said statutes, such violations being from the date of the granting of its permit to the date of the filing of the amended petition in the case upon which the parties went to trial. Said verdict and judgment assessed penalties aggregating One million, six hundred and twenty-three thousand, nine hundred dollars ($1,623,900), and cancelled the permit of the Waters-Pierce Oil Company to do business in the State, and the said judgment prohibited the Waters-Pierce Oil Company from thereafter doing any business in the State, except an interstate business.

On the same day that the judgment was entered in said cause, the State of Texas, by its attorneys, filed in said cause an application for the appointment of a receiver for all of the property of the Waters-Pierce Oil Company situated in the State of Texas, which application was set down for hearing, and after notice thereof, duly issued and served, and after an answer had been filed thereto by the Waters-Pierce Oil Company the court, after hearing and considering the said application, granted the same, and appointed a receiver for all the property and assets of the said Waters-Pierce Oil Company, situated within the State, pending the final disposition of the main cause. From the judgment of the court appointing such receiver, the said Waters-Pierce Oil Company perfected an appeal to the Court of Civil Appeals of the State of Texas, that being the proper court

under the procedure and practice to which to appeal such cases. This appeal was a distinct and separate appeal from that perfected in the main case, and the proceedings had in relation to the appointment of a receiver were alone sought to be reviewed on this appeal. Under the statutes of Texas, and the decisions of the Texas courts in this case, the Waters-Pierce Oil Company had a right to perfect a separate appeal in the receivership matter.

When the case reached the Court of Civil Appeals a motion was made to consolidate the same with the main case, which had also been appealed in the regular way, but the Court of Civil Appeals refused the motion.

Upon a consideration of the case, the Court of Civil Appeals affirmed the judgment of the trial court in appointing a receiver, and after a motion for rehearing had been overruled, the Waters-Pierce Oil Company applied to the Supreme Court of Texas for a writ of error to review and revise the decision of the Court of Civil Appeals. This was denied by the Supreme Court, and thereupon the said Waters-Pierce Oil Company sued out a writ of error from this court to the said Court of Civil Appeals of Texas, and the case is before this court for determination.

The questions for determination by this court are:

1. Is there a substantial Federal question raised in the case?

2. Was such Federal question, if any, properly presented to the State court, if presented at all?

3. If the alleged Federal questions were properly raised in the State court and in this court, do the proceedings complained of constitute due process of law?

4. Has a substantial Federal question been raised in the case whereby this court has acquired jurisdiction?

5. If the case involves a Federal question has it been so presented in the State court as to require a decision by that court and authorize a revision by this court?

6. If a Federal question was properly present in the State court was it properly decided by that court?

BRIEF AND ARGUMENT.

First Proposition.

There being no substantial Federal question involved in this suit, this court is without jurisdiction to pass upon the merits of the controversy.

STATEMENT.

Sub-division 3 of Article 1465 of the Revised Civil Statutes of Texas, passed in 1887, provides, among other things, as follows:

> "Receivers may be appointed by any judge of a court of competent jurisdiction in the state in the following cases: * * * 3. In cases where a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its charter rights."

The permit of the Waters-Pierce Oil Company, which was ordered cancelled by the judgment in the original suit, was granted on May 31, 1900. Sections 1, 2 and 3 of the Acts of the Legislature of April 11, 1907, authorizing the appointment of a receiver in this kind of a case, were as follows:

> "Section 1. Whenever any corporation created under the laws of this State, or any foreign corporation authorized to do business in this State, shall violate any law of this State, including any law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time

of such violation or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for all costs of suit and of collection, and the State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General or district or county attorney acting under his direction in any court of competent jurisdiction within this State for the purpose of forfeiting the charter or cancelling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties and forfeiture shall constitute notice of such lien. Where any such law has heretofore been violated, or shall be violated before the taking effect of this act, and a cause of action exists for such fine, penalties or forfeiture, or shall come into existence before the taking effect of this act, and suit shall be filed in such case, the State shall have a lien to secure the payment of such fine, penalties and costs from the time this act shall take effect on all property of such corporation within this State, or which shall thereafter come or be brought within the State.

"Section 2. Any action or cause of action for any fine, forfeiture, or penalty that the State of Texas has or may have against any corporation chartered under the laws of this or any other State, territory or nation, shall not abate or become abated by reason of the dissolution of such corporation, whether voluntary or otherwise, or by the forfeiture of its charter. Whenever a corporation against which the State has heretofore instituted suit or shall hereafter institute suit, for forfeiture of its charter, or cancellation of its permit, or for fines or penalties under any law of this State, shall dissolve in this or any other State, or shall have a judgment rendered against it in this or any other State for the forfeiture of its charter, the court in this State in which the suit is pending shall appoint a receiver for the property and business of such corporation within this State or that may come or be brought within this State during such receivership, or the court may, in any case wherein the State is suing for such

corporation for the forfeiture of its charter or for its permit to do business in this State, or for fines or penalties, appoint a receiver for such corporation, whenever the interests of the State may seem to require such action. If such dissolution shall take place or judgment or forfeiture be rendered against such corporation before this act takes effect, the court shall, upon the taking effect of this act, appoint a receiver for the property and business of such corporation in this State; and the State shall have the right to the writs of attachment, garnishment, sequestration or injunction, without bond, to aid in the enforcement of its rights created by this act; and all property that may come into the possession of any receiver appointed under the provisions of this act, not otherwise exempt by law, shall be subject to the lien herein created, and for the payment of such fine or penalty.

"Section 3. That Attorney-General, or any district or county attorney acting under his direction, may bring suit in the name of the State of Texas for the foreclosure of such lien in the district court of any county in the State of Texas, and in case the suit for foreclosure should be brought against any corporation which has dissolved or had a judgment for the forfeiture of its charter or the cancellation of its permit rendered against it, pending any suit by the State of Texas against such corporation for the forfeiture of its charter or cancellation of its permit or for penalties or fines, service may be had upon any person within this State who acted and was acting as agent for any such corporation in this State at the time of such dissolution or forfeiture of charter or cancellation of its permit."

The original application for a receiver, filed in the District Court of Travis County, Texas, in cause No. 24,551, The State of Texas vs. The Waters-Pierce Oil Company, was as follows:

"And now comes the State of Texas, acting by and

through her Attorney-General, and the county attorney of Travis County, Texas, acting under the direction and supervision of said Attorney-General, and shows to the court:

"First. That on the first day of June, 1907, in this court, in the above entitled and numbered cause, a judgment was rendered in favor of the State of Texas against the defendant, the Waters-Pierce Oil Company, for the sum of one million six hundred and twenty-three thousand nine hundred dollars ($1,623,900), and said judgment further providing for the cancellation of the permit of the said defendant to do business in the State of Texas; that said cause of action and said judgment was based upon alleged violation of the anti-trust law of the State of Texas.

"Second. That in a certain suit pending in the State of Missouri wherein the State of Missouri is plaintiff and the said above named defendant, the Waters-Pierce Oil Company, among others, is defendant, a suit was instituted for the forfeiture of the charter of said defendant, Waters-Pierce Oil Company, for prohibiting it doing business in said State, said suit being instituted in the Supreme Court of the State of Missouri; that in pursuance to law the said Supreme Court of the State of Missouri appointed a commissioner to hear the testimony and make his report and findings of fact, and recommendation of law thereon; that, after hearing the testimony, the said commissioner found in favor of the State of Missouri on all issues in said cause, and recommended to the said Supreme Court of Missouri that the charter of the said Waters-Pierce Oil Company be canceled; that plaintiff is informed and believes that said recommendations have the force and effect of a judgment forfeiting the charter of said defendant, Waters-Pierce Oil Company.

"Third. That the penalties recovered in this cause by plaintiff, the State of Texas, can not be collected outside the State of Texas, and the property of the defendant situated in the State of Texas, as the plaintiff is informed and believes, is wholly inadequate to pay

the above mentioned judgment; that the great bulk of the property within the State of Texas belonging to the defendant, subject to the payment of said judgment, consists of current accounts with merchants and dealers in the State of Texas, of tank cars, of money on hand, of oil that is easily removed, and property of that kind and character, practically the whole of it being personal, movable property, and if carried beyond the limits of this State can not be pursued by the State of Texas, and the State would have no way of collecting the above mentioned judgment; that under and by virtue of an act of the Legislature of the State of Texas, approved April 11, 1907, the State has a lien upon all of said property to secure the payment of the above mentioned judgment.

"Fourth. That under the judgment of ouster rendered in this case the defendant has no right to do business in this State, and has been convicted of doing business in this State in violation of the law for each and every day since the issuance of its permit seven years ago; that it is necessary to preserve and protect the rights of the State that said business of said defendant should be conducted and carried on, at least temporarily, and be kept a going concern in this State.

"Wherefore plaintiff requests the court to appoint a receiver to take charge of all the property and assets of every kind, character and description of the defendant situated within the State of Texas, pending the hearing of this application, that this court grant its most gracious writ of injunction, restraining and prohibiting the defendant, its officers, agents, attorneys and employes, or any of them, from removing from the State of Texas any part of the property or assets of said defendant situated within the State of Texas." (Rec., pp. 1-3.)

Upon presentation of this application to the judge of the court in which this suit was pending, the court endorsed thereon the following order:

"Austin, Texas, June 1, 1908. In Chambers. The above application for the appointment of a receiver of the property and assets of the Waters-Pierce Oil Company being presented to me, it is hereby set down for hearing on the 8th day of June, 1907, at ten o'clock A. M., at the Court House in Travis County, Texas, and the clerk will issue a notice to the defendant accordingly. Upon consideration, the application for a temporary injunction pending the hearing of said application is hereby granted, and the clerk of this court is instructed to issue such temporary injunction under his hand and the seal of court, restraining and prohibiting the defendant, its officers, agents, attorneys and employees, or any of them, from removing beyond the State of Texas, any of the property or assets of defendant until the further orders of this court.

"(Signed) V. L. BROOKS,
"Judge 26th Judicial District of Texas."
(Rec. p. 3.)

Notice of this application was duly issued and served on the Waters-Pierce Oil Company, and thereafter it duly filed in the cause an answer to the application for receiver, which was as follows:

"Filed June 10, 1907.
"In District Court of Travis Co., Texas, 26th Judicial District.
"No. 24,551.
"The State of Texas
vs.
"Waters-Pierce Oil Company.

"Now comes the defendant in the above entitled and numbered cause, by its attorneys, and excepts to the application filed by the plaintiff herein on June 1, 1907, for the appointment of a receiver of the property and assets of this defendant, and says that said application is insufficient in law, and shows no sufficient cause for

the appointment of such receiver, and of this defendant prays judgment of the court.

"CLARK & BOLINGER,
"COCHRAN & PENN,
"D. W. ODELL,
"N. A. STEDMAN,
"Attorneys for Defendant."

"And for answer to said application defendant denies all and singular the allegations therein contained.

"CLARK & BOLINGER,
"COCHRAN & PENN,
"D. W. ODELL,
"N. A. STEDMAN,
"Attorneys for Defendant."

"And for further answer to said application, and for the purpose of replying to the portion thereof relating to the said suit pending in the State of Missouri, defendant says that it is not true, as stated in said application that the recommendation of said commissioner have the force and effect of a judgment forfeiting the charter of this defendant, but, on the contrary, no judgment has been rendered in said cause in said Supreme Court of Missouri, and said report of said commissioner does not have the effect of a judgment, but that said report and recommendations of said commissioner may be either approved and rejected by said Supreme Court of Missouri, and will have no force and effect unless confirmed and approved by said Supreme Court of Missouri.

"CLARK & BOLINGER,
"COCHRAN & PENN,
"D. W. ODELL,
"N. A. STEDMAN,
"Attorneys for Defendant."

"Before me, the undersigned officer, on this day personally appeared D. W. Odell and R. L. Penn, who each being by me first duly sworn on oath deposes and

says that he is one of the attorneys for defendant in the above numbered and entitled cause and that the facts stated in the foregoing special plea are true as he is informed and verily believes.

"D. W. ODELL.
"R. L. PENN.

"Subscribed and sworn to before me by D. W. Odell and R. L. Penn, this 10th day of June, A. D. 1907.

"D. J. PICKLE,
"Clerk District Court, Travis Co., Texas.
"By E. Huppertz, *Deputy.*"

(Rec., pp. 4-5.)

After a hearing, certain orders were made by the court, which were amended by an order entered on June 15, 1907, which amended order is as follows:

"And now, on this 15th day of June, A. D., 1907, at a regular term of this court, it is considered, ordered, adjudged and decreed by the court that the orders of this court made and entered in said cause on the 10th day of June, A. D. 1907, and on the 13th day of June, A. D. 1907, be so amended as to hereafter read as follows:

"And now, on this 10th day of June, 1907, at a regular term of this court, there came on to be heard the application of the State of Texas for the appointment of a receiver of the property and assets of the Waters-Pierce Oil Company, a corporation, pending the further disposition of this cause, and the court, after duly considering said application, is of the opinion that the prayer should be granted and a receiver appointed to take charge of all the property and assets of the defendant, the Waters-Pierce Oil Company, situated within the State of Texas, or that may hereafter come within the State of Texas, and that such receiver shall immediately take charge of all of said property and assets, and hold the same subject to the further orders of this court, and said receiver is hereby directed and instruct-

ed to continue and carry on the business of the defendant until such future time as the court may direct, keeping and preserving the property coming into his custody and carrying on the business of marketing and supplying oil to the public in the State of Texas, with the right, power and authority to continue the various clerks, servants and agents of every class and grade now in the employ of the defendant or to discharge them and employ others at his discretion, and to require such bonds and security to himself as receiver from any of the present employees or those thereafter engaged by him as he may think expedient and proper; and to sell the present stock of oil and other products and personal property in the hands of the defendant and which may come into his hands as receiver, and to purchase and sell other oil, products and personal property in the regular course of business of the defendant to the same effect as the defendant could or might have done in the continuation of said business, so that said business may be kept up to its present condition as near as may be; and the said receiver shall have power, under the control of the court, to bring and defend actions in his own name as receiver, to take charge and keep possession of the property, to insure the same against loss and destruction by fire or otherwise as he may deem proper, to receive rents, collect, compound for, compromise demands, employ one or more attorneys at law, make transfers and generally to do such acts respecting the property as the court may authorize, and all the expenses of said receivership, including taxes, insurance premiums, attorneys' fees, his own compensation and all expenses of said receivership to be paid as a part of the court costs of the suit. That the temporary injunction heretofore granted, prohibiting the defendant from moving any of its property and assets beyond the limits of the State of Texas, be, and the same is hereby, continued in force until the further orders of this court.

"To all of which action the defendant in open court excepts, and in open court gives notice of appeal to the

Court of Civil Appeals of the Third Supreme Judicial District of Texas.

"And on this 13th day of June, A. D. 1907, the court confirming said order, and in pursuance thereof, names and appoints as receiver herein of the property in said order described Robert J. Eckhardt, who is a resident of the county of Williamson, in the State of Texas, with the duties and powers therein named, and fixes the amount of his bond as such receiver at two hundred and fifty thousand dollars ($250,000), to be made payable to the judge of this court, and his successors in office, for the use of all parties interested in said property and this suit." (Rec., pp. 7-8.)

From this order appointing a receiver the Waters-Pierce Oil Company prosecuted an appeal to the court of civil appeals, assigning as errors committed in the trial court the following, which were all of the errors assigned:

I.

"The court erred in overruling defendant's general exception to the motion or application of the State for the appointment of a receiver.

II.

"As the judgment recovered by the State of Texas against defendant on June 1, 1907, was a personal judgment and did not attempt to foreclose the lien claimed on defendant's property in the State, the Court was without jurisdiction by motion filed in the same cause to appoint a receiver, and erred in considering the same and in appointing the said Eckhardt receiver upon said motion.

III.

"The court erred in overruling defendant's request

for a postponement of action upon the said application until defendant should have a reasonable time to file a supersedeas bond in connection with its appeal from the main judgment rendered against it on June 1, 1907.

IV.

"The Court erred in making its order granting the application of the State of Texas for the appointment of a receiver of defendant's property by its order entered on June 10, 1907.

V.

"The Court erred in making and appointing Robert J. Eckhardt to be the receiver of defendant's property by its order entered on June 13, 1907.

VI.

"The Court erred in refusing to consider and approve defendant's supersedeas bond in the sum of One Hundred Thousand Dollars ($100,000.00) tendered on June 15, 1907, and in witholding its approval thereof until after the bond of the said Robert J. Eckhardt as receiver was tendered and approved on June 19, 1907.

VII.

"When defendant's appeal bond was approved and filed on June 15, 1907, superseding the judgment recovered against it by the State of Texas on June 1, 1907, in the main cause, the appointment of said Robert J. Eckhardt as receiver, and all orders and proceedings therefore had in connection with such appointment, were thereby vacated and becomes null and void, and the said Court erred in not entering a formal order recognizing the legal effect of the said supersedeas bond and vacating said appointment and setting

aside all of its said orders, and in further considering said appointment as in force for any purpose.

VIII.

"The Act of the Legislature of the State of Texas approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in so far as it attempts to create a lien upon this defendant's property for acts committed before the said act took effect, in violation of Section 16, Article 1, of the Constitution of the State of Texas.

IX.

"The Act of the Legislature of the State of Texas approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in that it attempts to create a lien upon this defendant's property for acts committed before said act took effect, in violation of Section 10, of Article 1, of the Constitution of the United States, which denies to any State the right to pass an *ex post facto* law, and the court erred in considering said act as the basis of its order appointing the said receiver.

X.

"The said Act of the Legislature of the State of Texas, approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void in so far as it authorizes the appointment of a receiver in a suit brought to recover a personal judgment in which no lien upon defendant's property was set up and adjudicated, and the action of the court in appointing the said receiver in this cause was in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it results in depriving defendant of its property without due process of law and in denying to defendant the equal protection of the laws.

XI.

"The said Act of the Legislature of the State of Texas, approved April 11, 1907, under which the Court acted in appointing the said receiver, is unconstitutional, null and void, in so far as it authorized the appointment of a receiver in a suit brought against the defendant to recover fines and penalties for offenses committed in violation of the anti-trust laws of the State, as a means of preventing the defendant from the further or continued violation of such laws, and the action of the court in appointing a receiver for defendant's property on that ground and for that purpose, as indicated in the opinion of the court at the time said appointment was made, was unauthorized in law, and in violation of Section 17, of Article 1, of the Constitution of the State of Texas.

XII.

"The said Act of the Legislature of the State of Texas, approved April 11, 1907, under which the court acted in appointing the said receiver, is unconstitutional, null and void, in so far as it authorizes the appointment of a receiver in a suit brought against a defendant to recover fines and penalties for offenses committed in violation of the anti-trust laws of the State, as a means of preventing the defendant from the further or continued violation of such laws, and the action of the court in appointing a receiver for defendant's property on that ground and for that purpose, as indicated in the opinion of the court at the time said appointment was made, was unauthorized in law, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the result of said action was and is to deprive the defendant of its property without due process of law and to deny to defendant the equal protection of the laws.

XIII.

"The Court erred in appointing the said receiver without any evidence being introduced before it at the time said appointment was made, to show that defendant did not intend to change its status and methods of doing business so as to conform to the laws of the State of Texas, and without evidence affirmatively showing that defendant could not make use of its property and carry on its business in accordance with law, and in holding that the court was authorized to so appoint a receiver for defendant's property in the State of Texas and deprive defendant of the instrumentalities by which it had been convicted of violating the laws of said State, based upon its past conduct and the said judgment of conviction rendered against it on June 1, 1907.

"Wherefore, defendant says that the said action of the court was unauthorized and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and has the effect of depriving defendant of its property without due process of law and in denying to it the equal protection of the laws.

XIV.

"The Court erred in disregarding the supersedeas bond filed by the defendant in connection with its appeal from the main judgment recovered against it on June 1, 1907, and in requiring defendant to file the additional bond in the sum of One Hundred Thousand Dollars to supersede the order appointing the said receiver and to avoid having to surrender its property to said receiver by reason of said appointment, and this action on the part of the Court was without lawful warrant and in violation of section one of the Fourteenth Amendment to the Constitution of the United States, in that the effect of such action by the Court was to deprive the defendant of its property without due pro-

cess of law and to deny to it the equal protection of the law.

XV.

"The Act of the Legislature of the State of Texas, approved April 11, 1907, being Chapter 87 of the General Laws of the State of Texas, passed by the Thirtieth Legislature at its regular session, in so far as it authorizes the appointment of a receiver of appellant's property in this suit or prosecution instituted against appellant prior to the passage of said act, and for offenses alleged to have been committed prior to its passage, is unconstitutional, null and void, in that it violates the tenth section of Article 1 of the Constitution of the United States, which provides that no State shall pass a bill of attainder or an *ex post facto* law.

XVI.

"The said Act of the Legislature of the State of Texas, approved April 11, 1907, is unconstitutional, null and void, in so far as it attempts to create a lien upon appellant's property for the alleged violation of the anti-trust laws of said State, in that the lien is not created by the terms of the Act, based alone upon the commission of the offense, but is left to be created by the action of the prosecuting officer in filing suit to recover the prescribed penalties. The statute therefore does not prescribe a fixed and uniform rule of law, applicable to all persons alike, but is a delegation of the legislative power to officer of the executive department to create the lien, or not to create it, and to arbitrarily discriminate betwen persons at will, and the appointment of the receiver to take charge of appellant's property under this statute, results in depriving appellant of its property without due process of law, and in denying to it the equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States are here urged and relied upon by appellant as against the validity and application

of said Act of the Legislature of the State of Texas to the matters involved in this case, and to the act of the court in appointing the said receiver thereunder." (Rec., 31-35.)

This appeal was prosecuted under the Texas statute, which authorizes an appeal from an order appointing a receiver without, in any wise, appealing from or carrying up the main case. The main case was carried up by separate appeal, and the two were docketed in the Court of Civil Appeals of the State of Texas, as Nos. 4212 and 4213. The Waters-Pierce Oil Company made a motion to consolidate the two causes, which motion was, by the court, overruled (Rec., p. 55), and they remained separate cases all the way through the Court of Civil Appeals, separate applications for writs of error were made to the Supreme Court, and separate applications for writs of error were made to and granted by one of the justices of this court.

Upon a hearing of the cause in the Court of Civil Appeals, it affirmed the judgment of the trial court, delivering an opinion in the following language:

"Fisher, C. J.—This is an appeal by the appellant from an order entered by the trial court appointing a receiver for the properties of the appellant company situated within the State of Texas. The history of the proceeding and the subject matter of controversy and the result reached by the trial court is fully explained and set out in the opinion of this court handed down in this case on June 28, 1907. There is also set out in that opinion the act of the Legislature of April 11, 1907, which we there construed and held to authorize the course pursued by the trial court, which is objected to in the appeal we are now considering. It is unnecessary for us to recapitulate what was stated in the opinion referred to. We there, in effect, held that the act of the Legislature referred to was constitutional,

which ruling, after further consideration, we adhere to. The act in question clearly authorized the procedure pursued by the trial court, and the spirit, meaning, and purpose of the act authorized the court, upon dissolution of the permit to do business within this State of the appellant's company at the instance of the suit by the State, to appoint a receiver for its property within its jurisdiction. The reason for this conclusion we undertook to state in the opinion referred to, which agrees with the conclusion of the trial judge, as stated in the bill of exception which is a part of the record in this case.

"Independent of the power conferred by the act of the Legislature reviewed, we are of the opinion that the court had the authority to appoint a receiver by virtue of Subdivision 3 of Article 1465, Sayles' Civil Statutes, 1897. That subdivision is to the effect that a receiver may be appointed where a corporation is dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. The corporate right of the appellant company to do business within this State was by virtue of a permit that had been granted to it by the State, and, when an action is brought by the State to cancel and dissolve that permit, it is a proceeding which in our opinion comes within, if not the exact letter, the spirit and meaning of that part of the subdivision of the statute which relates to the forfeiture of the corporate rights of the corporation.

"It is contended by the appellant that in the appointment of the receiver the trial court proceeded without pleading and evidence. The record and proceedings brought to this court by the appellant for our review contains no statement of facts, but there is a bill of exception which was approved by the court, in which it is stated that the court, in passing upon the question of the appointment of the receiver, took judicial notice of the facts exhibited in the main case upon which the receivership is predicated, and of the judgment and decree rendered in that case, wherein it appears from the record in this case the judgment against the appel-

lant corporation was for a large sum, and also for forfeiting its permit to carry on and conduct its business wtihin this State. That branch of the case in which the receiver was appointed is merely an arm of the main case, and is incidental to that proceeding. Both of the statutes quoted and mentioned authorize and empower, if they do not expressly direct, the trial court to appoint a receiver when the State obtains its judgment canceling the permit. And there is another provision of the Act of 1907 which authorized a receiver to be appointed when the interests of the State might require it to be done. In view of these statutes, it is folly to say that the trial court must lose sight of the main controversy when he undertakes to appoint a receiver, and that before that jurisdiction can be exercised he must again rehear and review the facts that were established in the original case upon which the receivership depends; and we are of the opinion that the court was correct in the conclusion that it could take judicial knowledge of the facts established in the main case and the judgment based thereon. The appellant has seen fit to perfect a separate appeal from the order appointing a receiver, and it has no statement of facts in the record showing that the facts which the court took judicial knowledge of did not exist and were not sufficient to authorize the action of the court in making the appointment. The effect of the action of the court was to hold that the facts that he took judicial knowledge of were sufficient to authorize and justify the appointment. The record here shows that the State has actually recovered a judgment for penalties and for cancellation of the permit to do business. The presumption will be indulged in favor of the action of the trial court, and, no fact appearing in the record brought up here by the appellant which would negative and destroy the force of this presumption, we must hold that we have in this record facts sufficient to justify the judgment below.

"It is contended by the appellant not only that the facts are not sufficient, which contention we have just

disposed of, but that the appointment was made by the court without being predicated upon any pleading in the nature of a petition or bill by the State asking for and showing grounds for the appointment of a receiver. The document filed by the State upon which the court acted in making the appointment we construe to be of the nature of a pleading. It is addressed to the court, and states facts under the statutes discussed that would authorize the court to appoint a receiver. A general demurrer was interposed, it seems, to this application, and was overruled. It states grounds and reasons why the court should make the appointment, and some of these reasons stated are of the nature embraced in the statutes upon which a court may act in making the appointment. But, however, if it could be held that the application of the State could not be regarded as a petition or a bill or something in the nature of a pleading requesting the appointment of a receiver, or if an instrument of this character but fatally defective, then the question in the case of forfeiture of the franchise or permit and the power of the court to appoint a receiver is set at rest by the case of San Antonio Gas Co. vs. State, 22 Texas Civ. App., 118, 54 S. W. Rep., 293. It is there, in effect, held that where there is a judgment forfeiting the corporate rights the court can, independent of the request of any one, exercise his judicial discretion as to whether he will or will not appoint a receiver. It is unnecessary to repeat what the court in that opinion says upon the subject. The proposition is forcibly discussed, and the ruling is squarely to the effect that the court can, without request, make the appointment in such a case.

"As said before, we find no constitutional objection to the statutes under which the court acted in making the appointment. What we have said is all that we think necessary to be said in disposing of this appeal." (Rec., pp. 56-58.)

Thereupon the Waters-Pierce Oil Company filed in the cause a motion for rehearing, as follows:

"IN THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

"WATERS-PIERCE OIL COMPANY, *Appellant*,
vs.
"THE STATE OF TEXAS, *Appellee*.

"APPELLANT'S MOTION FOR REHEARING.

"In the above cause now comes the appellant, the Waters-Pierce Oil Company, and moves the court to set aside its judgment herein entered on the 23d day of October, A. D. 1907, affirming the action of the District Court of Travis County in appointing Robert J. Eckhardt as receiver of appellant's property, and to grant to appellant a rehearing in this court of all matters involved in this appeal, and as grounds relied upon for such rehearing appellant says that this court erred in its said judgment of affirmance and in support thereof, in the following particulars, viz.:

"1. This court was without jurisdiction, and acted in excess of and beyond the proper exercise of its jurisdiction in considering the validity of the appointment of the said Eckhardt as receiver before considering and deciding the validity of the judgment rendered June 1, 1907, against appellant in said district court, which said judgment was made the basis for said appointment in the application filed for the State for the appointment of a receiver.

"2. The court erred in overruling appellant's motion to consolidate this proceeding with appellant's appeal from said judgment of June 1, 1907, and from said orders appointing said Eckhardt as receiver in said main cause, as shown by the transcript of the entire record of the judgment of all orders and proceedings in said main cause, including the orders and proceedings in connection with said appointment of Eckhardt as receiver, which said appeal embracing the entire case was first docketed in this court as Cause No. 4212, and is now pending and undetermined before this court.

"3. This court erred in overruling appellant's eighth assignment of error and in holding that the said District Court was authorized by the Act of the Legislature of the State of Texas, approved April 11, 1907, to appoint a receiver to take charge of appellant's property, because said Act of the Legislature is void and is an *ex post facto* law, in violation of Section 10, Article 1 of the Constitution of the United States, in attempting to create a lien upon appellant's property for the acts committed by it before said Act took effect in violation of the Anti-trust Laws of the State of Texas, and for which it was convicted and penalties assessed against it in said judgment of conviction rendered against it on June 1, 1907.

"4. This court erred in overruling appellant's sixth assignment of error and in holding that the said District Court was authorized by the Act of the Legislature of the State of Texas of April 11, 1907, to appoint a receiver to take charge of appellant's property, because said Act of the Legislature, in attempting to create a lien upon appellant's property for the alleged violation of the Anti-trust Law of the State of Texas, by providing that the State shall have such lien from the date of the institution of a suit by the Attorney-General, or a district or county attorney under his direction, in any court of competent jurisdiction in this State for the purpose of forfeiting the charter or cancelling the permit of a corporation violating the said Anti-trust Laws, and for fines and penalties against such corporation for such violation, does not prescribe a fixed and uniform rule of law applicable to all persons alike, but is a delegation of the legislative power to officers of the Executive Department to create the lien, or not create it, and discriminate between persons at will, and therefore the appointment of a receiver to take charge of appellant's property under this statute was unconstitutional, since it results in depriving appellant of its property without due process of law, and in denying to appellant the equal protection of the law, in violation of Section 1 of the 14th Amendment of the Constitution of the United States, which provides that no State shall

deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

"5. The court erred in overruling appellant's thirteenth assignment of error and in holding that the said District Court was authorized by the Act of the Legislature of the State of Texas, approved April 11, 1907, to appoint a receiver to take charge of the property of appellant, because said Act of the Legislature is void and an *ex post facto* law, in violation of Section 10, Article 1 of the Constitution of the United States, in attempting to confer authority for the appointment of a receiver to take charge of appellant's property as an incident to, and in aid of, the said judgment of conviction rendered against appellant on June 1, 1907, in that the appointment of such receiver has the effect of inflicting an additional punishment upon appellant, and of increasing the penalties prescribed under the previous laws for acts committed prior to April 11, 1907.

"6. This court erred in overruling appellant's ninth assignment of error and in holding that said District Court was authorized to appoint a receiver to take charge of appellant's property by the Act of the Legislature of the State of Texas, approved April 11, 1907, because under said Act of the Legislature the right to appoint a receiver is limited to actions against corporations, whereas, in a similar suit against an individual charged with violating the same laws, there is no provision made for the appointment of a receiver to take charge of his property, thereby making an arbitrary distinction between persons similarly situated, and rendering said Act of the Legislature unconstitutional and in violation of Section one of the Fourteenth Amendment to the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"7. The court erred in overruling appellant's first assignment of error in holding that said District Court was authorized to appoint a receiver to take charge of

appellant's property by the Act of the Legislature of the State of Texas, approved April 11, 1907, because the right, if any existed, to appoint a receiver under said Act could be exercised only in an orderly manner upon pleadings setting up the particular grounds upon which such appointment was sought to be made, and showing sufficient reasons for the appointment of a receiver, and because there being no proper pleadings in this cause the appointment of a receiver for appellant's property was unconstitutional, being in violation of that provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States which prescribed that no State shall deprive any person of life, liberty or property without due process of law.

"8. The court erred in holding that said District Court was authorized to appoint a receiver to take charge of appellant's property by virtue of Subdivision 3, Article 1465, Sayles' Civil Statutes of Texas, which is to the effect that a receiver may be appointed where a corporation has forfeited its charter rights, because treating, as the court did, the cancellation of the permit of appellant to do business in the State of Texas, as the forfeiture of the corporate rights of appellant, such forfeiture was made by virtue of the judgment of said District Court entered June 1, 1907, in the main suit convicting appellant of violating the Anti-trust Laws of the State of Texas, and was a part of that judgment; and further, because the appellant having superseded the execution of said judgment in such a manner that no process could be issued or proceedings had in aid of its enforcement from the date of its rendition, the appointment of the receiver to take charge of appellant's property was without authority; and because further to sanction and sustain the appointment of the receiver and to hold that said appointment has any legal effect, results in denying to appellant the benefit and protection which all other litigants enjoy under the laws of the State of Texas by superseding a judgment, and would therefore be unconstitutional and in violation of that part of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which pro-

vides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

"9. This court erred in not sustaining appellant's second proposition under its fifth assignment of error, and its fourteenth assignment of error submitted as a proposition in connection with said fifth assignment of error, wherein appellant claimed the protection of said Section 1 of the Fourteenth Amendment to the Constitution of the United States, because of its said bond superseding and staying the execution of said judgment of June 1, 1907, rendered against it, and the action of this court in affirming the judgment of said District Court appointing the receiver, and in holding that said appointment has any legal effect, results in denying to this appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"10. This court erred in overruling appellant's eleventh assignment of error and in holding that the said District Court was authorized by the Act of the Legislature, approved April 11, 1907, to appoint a receiver to take charge of appellant's property in a suit brought against appellant to recover fines and penalties for offenses committed in violation of the Anti-trust Laws of the State, as a means of preventing the appellant from the further or continued violation of such laws, and the action of said District Court in appointing a receiver for appellant's property on that ground and for that purpose, as indicated in its finding—the time of the making of said appointment, by virtue of said Act of the Legislature, is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the result of said action, under said Act of the Legislature, is to deprive appellant of its property without due process of law and to deny to it the equal protection of the laws.

"11. The court erred in overruling appellant's twelfth assignment of error and in holding that the said District Court was authorized by the Act of the Legislature of the State of Texas, approved April 11, 1907, to appoint a receiver to take charge of appellant's prop-

erty without any evidence being introduced before the court at the time the appointment was made to show that appellant could not make use of its property and carry on its business in accordance with law, and such action by said District Court so affirmed by this court results in depriving appellant of the use of its property for the purpose of conducting an interstate business guaranteed to it under the provisions of the Constitution of the United States in paragraph four, Section 8, of Article 1 of said Constitution.

"12. This court erred in holding that Subdivision 3, Article 1465 of the Revised Statutes of the State of Texas, has any application to the appointment of the receiver involved in this appeal, because the said Subdivision of said Article has no application to the cancellation of the permit of appellant as a foreign corporation and it has the right to continue in possession and enjoy the use of its property after the cancellation of its permit, and may conduct a business protected under the Commerce Clause of the Constitution of the United States, and may sell or remove its property at will, and to deny to it the possession and use of its property for these purposes by the appointment of a receiver to take charge of its property, as was done under the orders of said District Court and affirmed by the judgment of this court, results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"13. This court erred in holding that the appointment of the receiver in this proceeding at the suit of the State was authorized by said Act of the Legislature of the State of Texas, approved April 11, 1907, and also under the provisions of Subdivision 3, Article 1465 of the Revised Statutes, independent of the rights of the State as a creditor holding a legal interest in appellant's property, and since the judgment of the State against appellant was secured by the supersedeas bond given by appellant upon said judgment, as required by law, the State had no such interest in appellant's property as to authorize the appointment of a receiver,

and both of said statutes, when construed as authorizing the appointment of a receiver for appellant's property, are unconstitutional, and this action of the court based thereon results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"14. This court erred in its finding and conclusions of law in holding that the District Court was authorized at the hearing of the application for the appointment of a receiver in this proceeding, to consider the evidence which was submitted in the main cause, and that the appointment of the receiver herein should be affirmed, based upon the presumption that sufficient evidence was introduced at the hearing of the main cause to show that the interests of the State of Texas required such appointment. This holding on the part of the court was erroneous because if the trial court could take judicial notice of what occurred in the main cause, this court is also required to take like notice thereof, and this can only be done by considering the appointment of a receiver in connection with the appeal in the main cause now pending before this court. This holding is also erroneous because the application upon which an appointment was made did not set out any facts showing that the State had any interest requiring the appointment of the receiver beyond the collection of its judgment, and the act of this court in sustaining the appointment based upon the presumption that something may have been shown at the hearing of the main case, although it was not set out in the application, results in depriving appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"Wherefore, and upon each of the foregoing grounds of error committed by this court, appellant moves the court to grant it a rehearing herein, and to set aside and vacate its said judgment affirming the judgment of District Court of Travis County appointing the said Robert J. Eckhardt receiver of appellant's property.

"Appellant represents that the Hon. R. V. Davidson,

who is the Attorney-General of the State of Texas, and Jewel P. Lightfoot, an Assistant Attorney-General of said State, and T. W. Gregory and R. L. Batts, composing the firm of Gregory & Batts, and George W. Allen and W. D. Hart, composing the firm of Allen & Hart, are the attorneys of record for the appellee, the State of Texas, and that each of said attorneys reside in Travis County, Texas, and service of this motion is prayed to be had upon one of said attorneys, as required by law.

"Respectfully submitted,

"CLARK & BOLINGER,
"N. A. STEDMAN,
"D. W. ODELL,
"COCHRAN & PENN,
"Attorneys for Appellant."

(Rec., pp. 59-64.)

This motion was overruled without a written opinion (Rec., p. 64). Thereupon the Waters-Pierce Oil Company filed an application to the Supreme Court of the State of Texas, praying for a writ of error to the Court of Civil Appeals to review its decision. This application was denied (Rec., p. 82), and thereupon the Waters-Pierce Oil Company sued out a writ of error to this court and brought the case here for revision, and assigned errors in this court.

AUTHORITIES.

St. Louis Giradea & Ft. Smith Railway Co. vs. The State of Missouri, 156 U. S., 478;
Armstrong vs. Athens Co., 16 Pet., 281;
New Orleans Water Works Co. vs. Louisiana, 185 U. S., 336;
Simon vs. Craft, 182 U. S., 427;
New Orleans vs. New Orleans Water Works, 142 U. S., 79;
Terrett vs. Taylor, 9 Cranch., 43;
Murray vs. Hoboken Land & Imp. Co., 18 Howard, 272;

Hammond vs. Johnson, 142 U. S., 73;
Crowell vs. Randell, 10 Peters, 368;
McKinney vs. Carroll, 12 Peters, 66;
Commercial Bank vs. Buckingham, 5 How., 317;
Detroit, etc., vs. Guthard, 144 U. S., 133.

ARGUMENT.

The first case cited, *supra,* that of Railroad Co. vs. State of Missouri, is decisive of the question presented here. In that case, two State courts of concurrent jurisdiction had each appointed receivers for the property of a railroad company and one set of litigants applied to the Supreme Court of Missouri for a writ of prohibition against the judge of the other court, and the complainants in the case in the latter court and the receiver appointed in that court, to the end that the court in which the first suit was instituted, should be declared to have acquired jurisdiction of the property, and that the last named court should be directed to cease from taking any further action in that court in the case in which it was attempting to exercise jurisdiction, and directing its receiver to turn over all the property of the railway company in his hands as receiver to the receiver appointed in the first suit. From a judgment granting the writ of prohibition, the aggrieved parties undertook to have the judgment revised by this court, and this court, speaking through Mr. Justice Shiras, in dismissing the writ of error, says:

> "The mandatory portion of the writ as granted, commanding the receiver appointed by one State court to turn over the property in his hands belonging to the defendant corporation to the receiver appointed by another did not operate to take away from the defendant its property, and bestow it upon a third person. *The title to its property continued in the company as before, and that title was no more disturbed or impaired by the judicial order establishing the right of custody to belong to one of two contending receivers, than it was*

> *by the original order appointing a receiver.* That in a foreclosure suit, to appoint a receiver is to deprive the defendant of its property within the meaning of the Constitution of the United States, is a novel proposition, and does not, in our view, raise a real, as distinguished from a fictitious, Federal question."

By the allegations made in the motion for the appointment of a receiver in this case, the State asserted a lien on the property of the Waters-Pierce Oil Company, alleged the forfeiture of its corporate rights, alleged that all of its property in the State subject to the State's debt was insufficient to meet such debt. Under the practice in the State courts of Texas, the court forfeiting the corporate rights of a corporation could wind up its affairs so far as property and claims in the State were concerned, and all matters involving any claim to or against any of the property placed in the hands of a receiver could be settled and determined in that suit.

See—

East Line & Red River R. Co. vs. The State, 75 Texas, 451-452; and Texas Trunk Ry. Co. vs. The State, 83 Texas, 3-7;
Also Farmers' L. & T. Co. vs. Railway, 177 U. S., 61.

Mr. Justice Peckham, delivering the opinion of the court in the case of New Orleans Water Works Co. vs. State of Louisiana, *supra*, collates and discusses all of the leading authorities on the question of when a substantial Federal question is made in a case, and, speaking for the court says that it is not every case in which a Federal question is fully set out in the assignments of error, or the application for a writ of error, that this court will take jurisdiction of the controversy; but that the question must be real and not colorable, and in discussing the question says:

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgment of the State courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefore, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus, in Millinger vs. Hartupee, 6 Wall., 258, 18 L. Ed., 829, the Chief Justice (at page 261 L. Ed., p. 839) said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power.'

"This case arose under the 25th section of the judiciary act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion."

After citing and discussing numerous cases, he says:

"These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appears that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction.

"We must look at the question submitted by the plaintiff in error in the light of these decisions for the purpose of determining whether there is any fair foundation for the several claims. It must also be remembered that for years prior to and at the time of the formation of this corporation, it was the unquestioned law that all corporations were created by the State,

subject to its implied power, if not stated in the charter, to dissolve the corporation for a misuse or for a nonuse of its corporate powers or obligations. The contract contained in the charter is also subject to this power residing in the State.

"Thus in the case of Terrett vs. Taylor, 9 Cranch., 43, 3 L. Ed., 650, it was stated by the court (p. 51, L. Ed., p. 653):

> " 'A private corporation created by the legislature may lose its franchises by a misuse or a nonuser of them; and they may be resumed by the government upon a judicial judgment upon a *quo warranto* to ascertain and enforce a forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation.' "

The language used in the above-named opinion is especially applicable to the facts in this case. When the record is sifted there is only the barest suggestion of one Federal question in the case and that is contained in No. 28 of the assignments of error, filed with the application for a writ of error in this court, which is as follows:

> "There is also manifest error in this that after judgment was improperly given upon the said verdict, as aforesaid, for the plaintiff, the court appointed a receiver of the property and assets of the defendant, the Waters-Pierce Oil Company, as specified in the order appointing a receiver, whereas the court ought not to have appointed such receiver. And by the appointment of such receiver, the defendant is deprived of its property without due process of law, contrary to the provisions of said Constitution."

It must be borne in mind that the Court of Civil Appeals, which was the highest court in this case, because a writ of error was denied by the Supreme Court of Texas, held that

the trial court was authorized to appoint a receiver, under two separate and distinct laws or statutes of the State of Texas, which are set out above.

Every assignment of error made in the trial courts, in the Court of Civil Appeals, and in this court, attacked the Act of the Legislature of the State of Texas of April 11, 1907, on the ground that it was unconstitutional and void because of violation of the Constitution of the United States, prohibiting the passage by State legislatures of an *ex post facto* law, claiming that this law was an *ex post facto* law in that it undertook to fix a lien upon the property of a corporation convicted of acts committed prior to the passage of such law; and further, was not due process of law, and did not give the equal protection of the law, because such lien could arise or be created only by the act of an executive or judicial officer of the State, and was given only on property of corporations so violating the law.

These questions are not in the case in any manner, or form (although they are stated with great particularity in all of the different assignments of error) for the reason that the question of the lien has never been decided by any State court, and this court will certainly not consider the validity of the statute unless the State courts, whose decisions are sought to be reviewed, have an opportunity to pass upon them. It may be that upon a hearing of the question of the validity of the lien that the trial court will hold that the law is invalid, because in violation of the Constitution of the United States. The question of the constitutionality of the law because of the lien sought to be created by the act, has never been passed on either in the trial court, the Court of Civil Appeals or the Supreme Court of the State, and could not possibly arise in the controversy that has gone through those courts. This question can only arise when the State undertakes, if it ever does, to foreclose the lien sought to be given by this act. All that has been held

so far was that the court was authorized to appoint a receiver under the laws of Texas. But even if there had been no statute of 1887 and 1907, the court having general equity jurisdiction could have appointed such receiver pending the final disposition of the cause, because every fact was alleged that would warrant such appointment by a court of equity.

It might as well be contended that a receiver should not be appointed in a suit brought for the foreclosure of a mortgage, when it is alleged that facts exist that warrant the appointment of a receiver pending the final disposition of the controversy, because such mortgage is invalid, without consideration, or void for any reason that would be a bar to the cause of action asserted, although the court might be of the opinion it was necessary to appoint a receiver. All that would be necessary in a suit of that sort would be for the complainant to make out a *prima facie* case by showing that he asserts a mortgage or lien upon the property, and by alleging facts that would render it necessary for the court to appoint a receiver to take charge of the property, pending the adjudication of the controversy. Any suit for the appointment of a receiver could be defeated, if the plaintiff in error's contention is correct, by setting up facts that would be a bar to the cause of action and saying to the court you must pass finally on all these questions in bar, and then appoint a receiver after they have been litigated through all the courts. It would then be too late to make such appointment.

The sole purpose of appointing a receiver in any case is that an officer of the court may be named to take possession, as an arm of the court, of the *res* involved in a controversy, and hold it while the main controversy is being waged. In every contested suit in which a receiver is appointed, if it should be finally adjudicated that the plaintiff has no cause of action, that determines the receivership, unless other par-

ties having rights have intervened. Therefore, it is idle to say that a Federal question can be raised in this case by attacking the law of 1907, claiming it invalid as an *ex post facto* law, in that it undertakes to give a lien on property of a corporation for acts committed prior to the passage of such law, when the question of the validity of that lien has never been called in question or adjudicated in the State courts. All that the trial court said, or that the appellate courts have said, was that there was a claim of a lien made by the State, and that, pending the determination of the question as to whether or not it had a debt and a lien, the court, for reasons that were sufficiently shown, would appoint a receiver to preserve the property of the Waters-Pierce Oil Company. That is all that is involved in the controversy in so far as the Act of 1907 is concerned.

But even if a Federal question could be raised as to the Act of 1907, that is eliminated from this controversy for the reason that the Court of Civil Appeals expressly holds, in its opinion, that not only was the trial court justified, but it was its duty to appoint a receiver upon the rendition of the judgment, forfeiting the corporate rights of the Waters-Pierce Oil Company, because Section 3 of Article 1465 of the Revised Statutes of Texas, that were in force long before the Waters-Pierce Oil Company ever obtained its permit to do business in Texas, provides for such procedure. Therefore, the sole proposition to be determined in this case in disposing of the controversy, is whether or not there is a Federal question involved in the case under Section 3, Article 1465 of the Revised Statutes of the State of Texas, in view of the decisions of the Court of Civil Appeals in this case? Because if the Court of Civil Appeals is right (and that question cannot be passed on by this court) in its construction of that Subdivision of the Revised Statutes, then independent of the Act of 1907, the court was warranted in appointing a receiver.

Now, what is the Federal question raised in view of that holding? The one sought to be raised, and the only one, as shown above, that vaguely hints at a Federal question, is: That the defendant is deprived of its property without due process of law, contrary to the provisions of said Constitution. It does not say what Constitution, whether State or Federal. But if it be assumed that the Federal Constitution is intended, then the so-called Federal question is presented by the contention: That the defendant is deprived of its property without due process of law by the action of the court in appointing a receiver.

As has been held every time the matter came before this court, to properly raise such a Federal question the party must invoke the protection of the Constitution or laws of the United States by proper pleading in the State court. That was not done in this case, as will be more fully shown in another portion of this brief. The point we are now making is, that even if any provision of the laws or Constitution of the United States had been invoked that for the reasons pointed out by Judge Peckham in the case of New Orleans Water Works Co. vs. State of Louisiana, *supra,* no Federal question has been raised. We further quote from that opinion:

> "The State in this case has secured the forfeiture of the charter of the defendants by means of a judicial decree obtained in a State court which had jurisdiction to give the relief prayed for, and after a hearing of of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based have been judicially decreed and found, and the defendant has had full opportunity for its defense upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture, because of a violation by defendant of the conditions of its charter, was

implied in the very grant of the charter itself. The claim, therefore, that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the State by such judgment had denied the defendant the equal protection of the law, cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the State court. That court had full jurisdiction over the parties and the subject-matter and its decision of the question was conclusive in this case so far as this court is concerned.

"Neither the legislative resolution, nor the action of the attorney-general, nor that of the Supreme Court of the State, nor all combined can, as contended for by plaintiff in error, be in anywise regarded as the taking by the State of property without due process of law through the instrumentality of its legislative, its executive and its judicial departments, either jointly or severally. When analyzed, the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of the law by its courts of justice, has by such courts erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination."

The whole matter briefly stated is this: At the time the Waters-Pierce Oil Company applied for a permit to do business in the State of Texas, there was upon its statute books a law which provides that, if the Waters-Pierce Oil Company, or any other corporation, violated any of the laws of the State, the permit of such corporation, if it was a foreign one, should be cancelled. There was also a provision in force long before the Waters-Pierce Oil Company applied for its permit, to the effect that when the corporate rights of a corporation were forfeited in a judicial proceeding, it was the duty of the court to appoint a receiver for its property and assets. These were laws that were in force at the

time the Waters-Pierce Oil Company sought and obtained the privilege of doing business within the State, and, of course, that privilege was granted subject to these laws, and the Waters-Pierce Oil Company accepted this privilege and submitted to these provisions. Where then, is there a lack of due process of law? These provisions, as stated were part of its contract with the State of Texas, and when it breached that contract the State could, without judicial ascertainment, have enforced these forfeitures if it had so desired. But it did not do so. On the contrary, it went into a court of competent jurisdiction; notice was issued and served upon the Waters-Pierce Oil Company; it answered fully; a trial was had before a jury; that trial resulted in a verdict of conviction upon which a judgment was based finding it guilty; it had the right to appeal through all the State courts and did appeal. A forfeiture being had of its corporate rights, and a receiver appointed on such forfeiture, after due notice and full hearing, it now claims that it is deprived of its property without due process of law, although the order of the court appointing a receiver on its face shows that the property is only taken into custody of the court, pending the final determination of the main controversy. The title is not divested from the Waters-Pierce Oil Company and vested in some one else. The property is not confiscated. The Waters-Pierce Oil Company is not deprived of its value. The receivership is simply a judicial sequestration by which the property is taken out of the hands of the directors and officers of a corporation, after such directors and officers have violated the law and shown that they were unfit trustees to handle the property of the stockholders of such corporation, and after they had violated repeatedly the laws of the State in which they were doing business.

As was said in Den *ex dem.* Murray vs. Hoboken Land & Improvement Co., 18 How., *272*, 15 L. Ed., *372*:

"The question of what amounted to due process of law was examined, and the proceedings in that case held valid. Mr. Justice Curtis said, in delivering the opinion of the court:

> "'To what principles, then, are we to resort to ascertain whether this process, exacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.'

"And in Simon vs. Craft, 183 U. S., 427, it was held that the essential elements of due process of law were notice and an opportunity to defend, and in determining whether those rights were denied the court will be governed by the substance of things, and not by mere form; that the due process clause in the Fourteenth Amendment of the Constitution did not necessitate that the proceedings in a State court should be by a particular mode, but only that there should be a regular course of proceeding, in which notice was given of the claim asserted and opportunity offered to defend against it."

In this case not only was there notice given and an opportunity to defend, but there was an appearance by the Waters-Pierce Oil Company in the proceeding, an answer made and an actual defense asserted, and only after such appearance and answer was there an appointment of a receiver. The acts done and shown to have been done by the record in this case, clearly indicate that the Waters-Pierce Oil Com-

pany had its day in court; had notice of the proceeding; had an opportunity to defend, and did defend; and even if the court misconstrued the State statutes or erroneously applied the law to the facts in the case, a review by this court would not be authorized.

SECOND PROPOSITION.

The alleged Federal question not having been called to the attention of the trial court or the appellate court until after final judgment was rendered in the latter court, this court has no jurisdiction over this controversy.

AUTHORITIES.

Hulburt vs. Chicago, 202 U. S., 275;
Lawler vs. Walker, 14 Howard, 149;
Chapin vs. Fye, 179 U. S., 127;
Bolin vs. Nebraska, 176 U. S., 83;
Clark vs. McDade, 165 U. S., 168;
Oxley Stave Company vs. Butler, 166 U. S., 648;
T. & P. R. R. Co. vs. S. P. R. R. Co., 137 U. S., 48;
Endowment, etc., vs. Kansas, 120 U. S., 103;
Weber vs. Rogan, 188 U. S., 10;
Pim vs. St. Louis, 165 U. S., 273;
Railroad Co. vs. McGuire, 196 U. S., 128;
Allen vs. S. P. R. R. Co., 173 U. S., 479;
M. K. & T. R. R. Co. vs. Ferris, 179 U. S. 602;
Hammond vs. Johnson, 142 U. S., 73;
Kennard vs. Louisiana, 92 U. S., 480;
Lent vs. Tillson, 140 U. S., 316;
C. B. & Q. R. R. Co. vs. Chicago, 166 U. S., 226;
Rule 29, page 659, 94 Texas;
Simmerman vs. Nebraska, 116 U. S., 54;
Coons vs. Gallaher, 15 Peters, 18;
Ocean Ins. Co. vs. Polleys, 13 Pet., 157;
Mills vs. Brown, 16 Pet., 525;
Moore vs. Mississippi, 21 Wallace, 638;
Poydras vs. Louisiana, 18 How., 192.

STATEMENT.

The application for a receiver and answer of the Waters-Pierce Oil Company are set out in full under proposition one and are not again copied here. The assignments of error in the trial court and in the Court of Civil Appeals are also set out in full under defendant in error's first proposition, and are not here again copied. The motion for rehearing in the Court of Civil Appeals by the Waters-Pierce Oil Company is also set out in full under defendant in error's first proposition and is not copied here for that reason.

ARGUMENT.

It will be noticed that there are three Federal questions attempted to be raised by the assignments of error in this court. (1) That the Act of the Legislature of the State of Texas, approved April 11, 1907, violates the Constitution of the United States in that it is an *ex post facto* law, because it undertakes to create a lien upon the property of the defendant for violations of the law prior to the passage of the Act; (2) that the Act of the Legislature of the State of Texas, approved April 11, 1907, and the procedure provided for thereunder does not constitute due process of law and does not give to the Waters-Pierce Oil Company the equal protection of the laws with other litigants, and (3) that Subdivision 3 of Article 1465 of the Revised Statutes of Texas and the acts done thereunder in this cause do not constitute due process of law.

In so far as the plaintiff in error undertakes to raise a Federal question in this cause on account of any title, right, privilege or immunity claimed under the Constitution of the United States or any statute of the United States, the authorities are uniform that such title, right, privilege or immunity must be specially set up or claimed in the trial court, or the question must have been directly passed upon

by the State court. Of course, so far as any such question is attempted to be raised in regard to due process of law and the equal protection of the laws, no such privilege or immunity was claimed or set up in the trial court; were not passed on in that court and were not passed on in the appellate court. It is true that by assignments of error filed in the appellate court of Texas, the plaintiff in error undertook to raise the federal questions in a denial of equal protection of the laws, and a denial of due process of law on account of the Act of 1907, but those questions are of no avail and have no bearing on this case for the reason that the Court of Civil Appeals, by its decision, held that the court was authorized and justified in appointing a receiver for the property of the plaintiff in error, without reference to the Act of 1907. Therefore, they did not pass on the question as to whether or not the Act of 1907 violated the provisions of the United States Constitution and it was not necessary for them to do so, and would not have given this case a Federal question if they had done so, because the holding of the Court of Civil Appeals of Texas that an entirely independent act, not complained of in the lower court or in the appellate court until after final judgment, authorized the procedure taken.

It is equally well settled that the attempted raising of a Federal question, whether on account of the third provision of Section 709 of the Revised Statutes of the United States, or the first or second provisions of said section, comes too late when raised for the first time on a motion for a rehearing in the State appellate court, after judgment has been rendered.

In Weber vs. Rogan, *supra*, this court, speaking through Mr. Justice Brown, says:

> "There is hardly a semblance of a Federal question in this case. No such was noticed in the original peti-

> tion or in either opinion of the court; and it was not until after the application was made for a rehearing that petitioner discovered that the act of the legislature of 1895, as amended by the act of 1897 (Rev. Stat., 421), above cited, constitute a contract on the part of the State to sell all isolated and detached sections and fractions of sections of public school lands to any purchaser who would offer $1 per acre therefor, which had been impaired by the Supreme Court of the State in holding that the commissioner of the land office might refuse to execute such contract by declining to award the land applied for, and therefore violated its obligation."

After discussing the question as to whether or not a contract was created and impaired, the court proceeded:

> "In addition to this, however, the question was not made until after the final decision of the State court, and upon application for a rehearing. This was clearly too late. Miller vs. Texas, 153 U. S., 535, 38 L. Ed., 812, 14 Sup. Ct. Rep., 874."

The situation then is this: In so far as the Act of the Legislature of the State of Texas, approved April 11, 1907, is concerned, the court did not pass on its validity or invalidity, as to the lien sought to be created, because that question was not before the court, and therefore could not have been passed upon. And in so far as the provisions of Section 3, Article 1465 of the Revised Statutes are concerned, no Federal question was attempted to be raised in connection with the court's decision until after final decision in the Court of Civil Appeals of Texas. Under the Texas practice no question is noticed until the assignment of error, specifically calling in question the action of the trial court on any particular matter, is made; and unless the assignment is briefed in the presentation of the case to the appellate court, it is considered waived (Rule 29, p. 659, 94 Texas). The

court might have declined to pass on the so-called federal questions, upon the ground that they were not assigned as errors in the trial court and not briefed in the upper court.

In the case of Lawler *et al.* vs. Walker *et al., supra,* this court says:

> "The conflict of a State law with the Constitution of the United States and the decision by State courts in favor of its validity must appear on the face of the record, before it can be re-examined in this court; it must appear in the pleadings of the suit or from the evidence in the cause, in trial on instructions asked for or from exceptions taken to the ruling of the court; it must be that such a question was necessarily involved in the decision and that the State court would not have given a judgment without deciding it."

In Hulbert vs. Chicago, *supra,* this court, speaking through Mr. Justice McKenna, says:

> "According to the practice of the court" (speaking of the Supreme Court of Illinois) "an error not assigned is not open to review. Berry vs. Chicago, 192 Ill., 154, 61 N. E., 198. Errors assigned, but not noticed or relied on in the brief and argument of counsel, will be regarded as waived or abandoned. Keys vs. Kimmel, 186 Ill., 109-114, 57 N. E., 851. And such rule of practice will be recognized by this court. Erie R. Co. vs. Purdy, 185 U. S., 148."

The same rule applies in Texas as in Illinois. See Rule 29, page 659, 94 Texas.

Again, it is held in the case of Pim vs. St. Louis, etc., 165 U. S., 271-3:

> "We held at the present term, in Chicago N. W. R. Co. vs. Chicago, 164 U. S., 454, as had frequently before been adjudged, that this court could not review the final judgment of the highest court of the State, alleged

to have been denied a right protected by the Constitution of the United States, unless such right was specially set up and claimed in the State court by the party against whom the judgment was rendered. U. S. Rev. Stat., Par. 709.

"It is contended in this writ of error that the judgment below deprived the plaintiff in error of her property without due process of law, and that this result was accomplished by applying to the case a certain statute of limitations of Missouri as construed and enforced by the highest court of that State.

"Upon inspecting the record we find that no Federal right was set up or claimed, in any form, until after the final decision of the case by the Supreme Court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged Federal question, indeed, without any allusion to it. The claim of a Federal right came too late, so far as the revisory power of this court is concerned."

Again in the case of Chicago I. & L. R. Co. vs. McGuire, 196 U. S., 127, this court, speaking through Mr. Justice Brown, said:

"Motion is made to dismiss this writ of error upon two grounds: (1) That the supposed Federal question was not set up and claimed until too late. (2) That there is no Federal question in the case."

After discussing the reason for holding that the question was raised too late, the court proceeds:

"In this connection the plaintiff in error urges upon us the proposition that, as it relied solely upon the title derived by a foreclosure and sale in a Federal court, the State court must necessarily have considered and decided that question, and that in such cases the Federal Constitution need not be specially set up and claimed. This argument would necessarily not apply

to the Supreme Court of the State, which, as above indicated, might have held, and probably did hold, that the Federal question, not having been suggested in the court below, could not be made available on appeal. The appellant court did not discuss it. There are doubtless a few cases which hold that, where the validity of a treaty or statute or authority of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, and the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, the fact that it was not specifically set up and claimed is not conclusive against a review of such question here. But as the validity of no statute, state or Federal, or authorities thereunder, was called in question here, this rule does not apply. * * *

"This case is the not unfrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted.

"The Federal question, if any existed, as to which we express no opinion, was not set up or claimed at the proper time, and the writ or error must therefore be dismissed."

Again, in T. & P. Ry. Co. vs. S. P. Co., 137 U. S., 48, the court, speaking through Chief Justice Fuller, says:

"We are of the opinion that in Louisiana, as elsewhere, a title, right, privilege or immunity, is not properly claimed under the act of Congress, when suggested for the first time in a petition for rehearing, after judgment. The case of Stewart vs. Kahn, 78 U. S., 11, Wallace 493, cited for plaintiff in error, is not to the contrary. The petition referred to there seems to have been simply one for review on appeal, and not a petition filed after the case had been decided by the Supreme Court, and the record showed the decision of the Federal question by both tribunals."

THIRD PROPOSITION.

The action taken and proceedings had in the State courts constituted due process of law.

STATEMENT.

Same as under Defendant in Error's First Proposition.

AUTHORITIES.

Remington Paper Co. vs. Watson, 173 U. S., 443.
New Orleans Water Works Co. vs. Louisiana, 185 U. S., 336; Ry. vs. Mo., 156 U. S., 478.
Iowa C. R. Co. vs. Iowa, 160 U. S., 389.
New Orleans Debenture Redemption Co. vs. Louisiana, 180 U. S., 320.
Murray vs. Hoboken Land Imp. Co., 18 Howard, 272.
Rothschild vs. Knight, 184 U. S., 334.
Simon vs. Craft, 182 U. S., 427.
Consolidated Rendering Co. vs. State of Vermont, No. 5, Oct. Term, 1907, Sup. Ct. Reports, p. 178.
Cosmopolitan Club vs. Virginia, No. 9, Sup. Ct. Rep., p. 394, October Term, 1907.

In the case of Remington Paper Co., vs. Watson, *supra,* this court held:

> "The appointment of a receiver to take possession of the property of an insolvent corporation upon the petition of a creditor is certainly 'due process.' This, of course, is not denied, but the invalidity of the order of appointment is asserted because it was made *ex parte,* and because Watson had not fully qualified. It is hence argued that the appointment was a nullity, constituted no legal obstacle to the proceeding in the United States Circuit Court. * * * * The action was regularly proceeded with and was determined against plaintiff in error on grounds that did not involve

Federal questions and therefore it is not within our power to review the judgment of the Supreme Court of the State. The plaintiff in error thus sought in the State court and was given opportunity to litigate the rights claimed by it and it cannot complain that the guaranties of the Constitution of the United States were denied because the litigation did not result successfully."

Again it was held in the case of Cosmopolitan Club vs. Virginia, *supra*:

"It must, therefore, be held that the contract between the club and the State did not authorize the club to disregard the valid law of the State regulating the licensing and sale of liquors. Such a course upon the part of the club was alleged to be a misuse of its corporate privileges and franchises. The distinct charge against the club in the corporation court was that it was being conducted for the purpose of violating and evading the statute regulating the licensing and sale of liquors—a statute which the commonwealth could rightfully enact under its power to care for the health and morals of its people. And the court adjudged the charge against the club was sustained, the result being that, by the statute, the chartered rights and franchises of the club ceased without any further proceedings. Even if this court could re-examine the judgment of the corporation court on the facts, the present record would not justify us in holding that error was committed.

"Was this result consistent with the due process enjoyed by the Constitution? This question must be answered in the affirmative. The proceedings against the club were had in a court competent under the Constitution and laws of Virginia to determine the questions raised by the complaint against the club. This must be assumed to be the case after the highest court of Virginia refused a writ of error, upon the ground that the judgment of the corporation court was plainly

right. The mode of proceeding against the club was not unusual in such cases. As early as Terrell vs. Taylor, 9 Cranch., 43, 51 L. Ed., 650, 653, this court said: 'A private corporation created by the legislature may lose its franchises by a misuser or a non-user of them; that they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture.' So, in New Orleans Water Works Co. vs. Louisiana, above cited, the first of several questions raised there was that, since the charter of a certain water works company prescribed mandamus as the remedy to maintain a lawful tariff of water rates, was not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of property without due process of law, and a denial of the equal protection of the laws? The court answered the question by saying: 'The answer to the first question is, as to mandamus being the exclusive remedy for illegal rates, is that the State court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by *quo warranto* at the suit of the State, through its Attorney-General. The claim that, by so proceeding, there is an impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation. An examination of this question, among others, was made by the State court after full hearing of all parties and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question.'

"It thus appears that the club ceased to exist as a corporation in virtue of a judgment of a court of competent jurisdiction, all the parties being before it and given full opportunity to be heard. Such a judgment cannot be held to have violated any right belonging to the club under the contract or other clause of the

Federal Constitution. Foster vs. Kansas, 112 U. S., 201, 206, 28 L. Ed., 629, 697, 5 Sup. Ct. Rep. 8, 97; Kennard vs. Louisiana, 92 U. S., 480, 23 L. Ed., 478; New Orleans Water Works Co. vs. Louisiana, above cited."

In the case of New Orleans Debenture Redemption Co. vs. Louisiana, *supra*, the court, on page 330, says:

"Nor do the facts in this case furnish any foundation for the claim on the part of the plaintiffs in error that the State after having granted the right to be a corporation could not, after the corporation was created, deny to it the common right to pursue any lawful business or enterprise not inconsistent with the object and purposes of its creation. The claim rests upon the proposition that the State cannot deny to the company the common right to pursue any lawful business or enterprise. If the business or enterprise be not lawful, the whole argument fails. If not created for a lawful purpose the company was not created at all. It is not a question of the right to do certain business after it was authorized by the State to organize as such corporation. Its legal creation depended upon the lawful character of the work it was organized to do. Whether the business be lawful is, in a case like this, a question of local law, and a decision by the State court upon that question is not reviewable here. The right to be a corporation was given by the State upon the terms that the business transacted should be lawful, and it certainly must rest with the State to determine whether the business thus transacted by a corporation is or is not lawful. Whether such business could be done by individuals without the intervention of a corporation is not to the point. The State having the right to say upon what terms and upon what conditions it will grant the right of incorporation, it must have the right to determine through its courts whether these conditions have been complied with. It granted the right by the act of 1888 to transact any

lawful business, as a corporation, upon filing articles, etc. It rests with its own courts to say whether the business transacted by such assumed corporation, by virtue of that act, is or is not lawful. Having decided that it was unlawful, the court had the right, under the State law, to declare the charter null.

"Then as to the rights of the individual corporators. Has their property been in any way taken without due process of law by this decree? Clearly it has not. Nor have they been denied the equal protection of the laws. As already stated, the decree adjudges the charter, under color of which the defendant company claimed corporate existence, to be null and void, and it enjoins the officers and stockholders from acting as a corporation, in the terms already set forth. This simply holds the property until it can be properly disposed of according to law."

In the case of Simon vs. Craft, *supra*, this court, speaking through Mr. Justice White, says:

"It is also urged as establishing the nullity of the appointment of a guardian of the estate of Mrs. Simon, that the proceedings failed to constitute due process of law, because (1) they were special and statutory, and the petition failed to state sufficient jurisdictional facts; (2) a jury was not impaneled as provided by law; and (3) there was no finding in the verdict of the jury or the order entered thereon, ascertaining and determining all the facts claimed to be essential to confer juristliction to appoint a guardian. But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it. Louisville and N. R. Co. vs. Schmidt, 177 U. S., 230, 236, 44 L. Ed., 747, 750, 20 Sup. Ct. Rep., 230, and cases

cited. If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the State court as to the regularity, under the State statute, of the practice pursued in the particular case. Tested by these principles, we accept as conclusive the ruling of the Supreme Court of Alabama and the jury which passed on the issues in the lunacy proceeding was a lawful jury, that the petition was in compliance with the statute, and that the asserted omissions in the recitals in the verdict and orders thereon were at best mere irregularities which did not render void the order of the State Court appointing a guardian of Mrs. Simon's estate."

FOURTH PROPOSITION.

The Act of April 11, 1907, is not repugnant to any provision of the Constitution of the United States in that it undertakes to create a lien in favor of the State upon property of corporations that violate the anti-trust laws of Texas by acts committed prior to the passage thereof.

AUTHORITIES.

Bangor vs. Goding, 35 Maine, 73.
Bolton vs. Johns, 5 Pa. St., 145.
Gordon vs. Canal Co., 1 McAr., 513, Federal Case No. 5621.
O'Neil vs. St. Olof's School, 26 Minn., 329.
Colpetzer vs. Trinity Church, 24 Nebraska, 113.
Kellogg vs. Howes, 81 Col., 170, 6 L. R. A., 588.
Davis-Henderson Lehr Co. vs. Gottschalk, 81 Col., 641, 22 Pacific Rep., 860.
Gurney vs. Walsham, 16 R. I., 698.
Livingston vs. Moore, 7 Peters, 546, 562.
Louisiana vs. New Orleans, 102 U. S., 207.

It is shown elsewhere in the brief that the State courts, neither the trial nor appellate passed upon the validity of the lien given by the statute of 1907, because the statute

was not before them except as to whether it authorized the appointment of a receiver, and therefore it was neither necessary nor proper for them to pass upon the validity of the lien. The question of the validity of the lien can only arise when the State undertakes to foreclose that lien, if it ever does.

But counsel for plaintiff in error have so many assignments of error calling in question the validity of the statute because it undertakes to give a lien upon the property of violators of the anti-trust laws of Texas, for acts committed prior to its passage, and they have so strenuously dwelt upon that question that we feel constrained to discuss it briefly and cite the above authorities. While we feel sure this court will not pass upon that feature of the law for the reason that the State courts have not passed upon it, we nevertheless deem it our duty, in view of the contentions of the plaintiff in error, to call attention to the above authorities, which hold that statutory liens are merely remedies afforded for the collection of debts, and laws creating such liens to secure pre-existing debts are valid, and not repugnant to any provision of the Constitution of the United States, or amendment thereto.

The contention of counsel that the Act of 1907 is unconstitutional because it is repugnant to the provisions of the Federal Constitution which prohibits States from passing or enforcing *ex post facto* laws, is also without merit. It is not a punishment prescribed, it is simply a remedy for the enforcement of a right. It is immaterial what motive influenced the trial court, or what it had in mind as a reason for appointing a receiver. The Court of Civil Appeals held that it was within its power and that it was its duty, without any request being made therefor, to appoint a receiver in this cause.

The case of Havemeyer vs. Superior Court, etc., cited by counsel for plaintiff in error, is not in point for the rea-

son that the Supreme Court of California held that there was no statute of that State authorizing the appointment of a receiver in that class of cases; that it could only be done upon the application of a creditor, and that the State was not such creditor, as was contemplated by the statute.

Counsel also cite authorities, and say at page 202 of their general brief: "So, by the laws of Texas, as declared by its Supreme Court, the judge had no authority to go on and complete the appointment of the receiver after the original judgment had been superseded." But they cite no authority of the Supreme Court of Texas holding any such doctrine. They entirely ignore the fact that the Court of Civil Appeals held in this very case that the trial court was authorized to do everything he did, and affirmed his judgment, and the Supreme Court of Texas, by refusing a writ of error in this case, affirmed the judgment of the Court of Civil Appeals, and made the judgment of the latter court its judgment. So it is idle to speculate as to what the courts of Texas would have held in a different case, and whatever the laws of Texas are as construed by its courts in other cases, we are confronted with the proposition that in this case they said the trial court was right in appointing a receiver under the circumstances that existed.

As to the disposition of this case in the event this court reverses the judgment of the State courts in No. 359 in any particular.

Counsel for plaintiff in error assume that this cause will be reversed in the event that cause No. 359 is reversed. We do not understand that any such result necessarily follows. We have shown in other portions of our brief, we believe conclusively, that there is not the shadow of a Federal question raised in this case. In our reply to the motion to consolidate made in this court, we have shown that

they were separate and distinct cases, governed by different and distinct questions of practice. We also say that counsel for plaintiff in error entirely misapprehend and misconstrue the rights of the State in this case. This is not a proceeding in the nature of an execution. No such remedy is known to the practice in Texas. The matter is solely the right of the State to have a receiver appointed in the cause. It does not make any difference whether the application for such appointment was made in the beginning, in the middle or at the end of the main cause; nor does it matter what was the form of the application or whether there was an application at all. The State courts have passed upon all these questions, have decided them adversely to the contention of plaintiff in error, and this court will not review them unless there is a Federal question, and that Federal question is properly before this court. We have undertaken to show, and we believe we have shown, in other portions of this brief, that there is no Federal question in this case, and that if one could have been properly raised it was not done.

We understand that the court in cause No. 359 will only pass upon the questions of the constitutionality of the Act of 1899 and the Act of 1903, as construed by the highest State court of Texas. That if *either* of said acts are held to violate the Federal Constitution, it would only reduce the judgment to the extent that penalties were recovered under the act so declared unconstitutional, and affirm it as to the remainder; and in the event the penalties should be stricken out under *both* the statutes, then this court would still affirm the judgment as to the cancellation of the permit of the plaintiff in error. Because, even though the laws might be unconstitutional, the Act of 1899 was in force in Texas at the date of the issuance of the permit to the plaintiff, and it would therefore authorize a cancellation of the permit, even though no penalties could be recovered under it.

In either event the judgment of the State courts in appointing and in affirming the appointment of a receiver, would have to be affirmed, and would be affirmed by this court.

We respectfully suggest that the judgment of the State courts in this cause should be, in all things, affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1908.

THE WATERS PIERCE OIL CO.,
Plaintiff in Error.
vs.
THE STATE OF TEXAS,
Defendant in Error.
No. 359.

BRIEF FOR THE STATE OF TEXAS, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The repeated misstatements of material facts in the three briefs filed for plaintiff in error renders necessary a comprehensive statement by defendant in error.

STATUTES.

The parts of the acts of 1899 and 1903 necessary to be considered are as follows:

Sections 1, 2, 5 and 7 of the Act of 1899

"Section 1. Any corporation organized under the laws of this or any other State or country, and transacting or conducting any kind of business in this State, or any partnership, or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, combination, contract, association or confederation to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and to be subject to the penalties as provided by this act.

"Sec. 2. A 'monopoly' is any union or combination or consolidation or affiliation of capital, credit, property, assets, trade, custom, skill, or acts, or of any other valuable thing or possession, by or between persons, firms or corporations, or association of persons, firms or corporations, whereby any one of the purposes or objects mentioned in this act is accomplished or sought to be accomplished, or whereby any one or more of said purposes are promoted or attempted to be executed or carried out, or whereby the several results described herein are reasonably calculated to be produced; and a 'monopoly,' as thus defined and contemplated, includes not

merely such combinations by and between two or more persons, firms or corporations acting for themselves, but is especially defined and intended to include all aggregations, amalgamations, affiliations, consolidations or incorporations of capital, skill, credit, assets, property, custom, trade or other valuable thing or possession, whether effected by the ordinary methods of partnership or by actual union under the legal form of a corporation or an incorporated body resulting from the union of one or more distinct firms or corporations, or by the purchase, acquisition or control of shares or certificates of stock or bonds, or other corporate property or franchises, and all corporations or partnerships that have been or may be created by the consolidation or amalgamation of the separate capital, stock, bonds, assets, credit, properties, custom, trade or corporate or firm belongings of two or more firms or corporations or companies are especially declared to constitute monopolies within the meaning of this act, if so created or entered into for any one or more of the purposes named in this act; and a 'monopoly,' as defined in this section, is hereby declared to be unlawful and against public policy, and any and all persons, firms, corporations or associations of persons engaged therein shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.

"Sec. 5. Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State, at the relation of the Attorney General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.

"Sec. 7. Any corporation created or organized by or under the laws of this State, which shall violate any of the provisions of the preceding sections of this act, shall thereby forfeit its corporate rights and franchises; and its corporate existence shall, upon proper proof being made thereof in any court of competent jurisdiction in the State, be by the court declared forfeited, void and of non-effect, and shall thereupon cease and determine; and any corporation created or organized by or under the law of any other State or country, which shall violate any of the provisions of the preceding sections of this act shall thereby forfeit its right and privilege thereafter to do any business in this State and upon proper proof being made thereof in any court of competent jurisdiction in the State, its rights and privileges to do business in this State shall be declared forfeited; and in all proceedings to have such forfeiture declared, proof that any person who has been acting as agent of such foreign corporation in trarsacting its business in this State, has been, while actng as such agent, and in the name, behalf, or interest of such foreign corporation, violating any provisions of the preceding sections of this act, shall be received as prima facie proof of the act of the corporation itself; and it shall be the duty of the clerk of said court to certify the decree thereof to the Secretary of State, and if it be an insurance company, to the Commisioner of Insurance, Statistics and History of the State, who shall take notice and be governed thereby as to the corporate powers and rights of said corporation." Laws of 26th Legislature of Texas, p. 246.

Sections 1, 2, 3, 8, 11 and 17 of the Act of 1903:

"Section 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

"1. To create or which may tend to create or carry out restrictions in trade or commerce or tids to commerce or in the preparation of any product for market

or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity or business of transportation or insurance or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any

article or commodity or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

"6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

"7. To abstain from engaging in or continuing business or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof.

"Sec. 2. That a monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first section of this act.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"Sec. 3. That either or any of the following acts shall constitute a conspiracy in restraint of trade:

"1. Where any two or more persons, firms, corporations, or associations of persons who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation, or association of persons any article of merchandise, produce or commodity.

"2. Where any two or more persons, firms, corpora-

tions or associations of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

"Sec. 8. Every foreign corporation violating any of the provisions of this act is hereby denied the right, and is prohibited from doing any business within this State, and it shall be the duty of the Attorney General to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the State of Texas.

"Sec. 11. Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney General, or the district or county attorney under the direction of the Attorney General, to prosecute for the recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this act shall be over and above the fees allowed him under the general fee bill.

"Sec. 17. That all laws and parts of laws in conflict with this act, be and the same are hereby repealed, and that Title CVIII of the Revised Civil Statutes of the State of Texas of 1895, and Articles 5313, 5314, 5315, 5316, 5317, 5318, 5319, 5320, 5321 and 5321a, thereof, be and the same are hereby expressly repealed; and that Articles 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 988a, 988b, 988c, 988d of Chapter 7, in Title XVIII, of the Penal Code of the State of Texas of 1895, be and the same are hereby ex-

pressly repealed; and that an act entitled 'An Act to define trusts, provide for penalties and punishment of corporations, persons, firms and associations of persons connected with them, and promote free competition in the State of Texas, and to repeal all laws and parts of laws in conflict with this act,' approved April 30, 1895, and known and published as Chapter 83 of the General Laws of the Twenty-fourth Legislature, be and the same is hereby expressly repealed; and that an act entitled 'An Act to prohibit pools, trusts, monopolies and conspiracies to control business and prices of articles, to prevent the formation or operation of pools, trusts, monopolies and combinations of charters of corporations that violate the terms of this act and to authorize the institution and prosecution of suits therefor,' approved May 25, 1899, and published and known as Chapter CXLVI of the General Laws of the Twenty-sixth Legislature, be and the same are hereby expressly repealed; and that an act entitled 'An Act to amend Article 5318, Title 108, of the Revised Civil Statutes, of the State of Texas, prescribing penalties against trusts and conspiracies against trade,' approved June 5, 1899, and known as Chapter CLXXII of the General Laws of the Twenty-sixth Legislature, be and the same is hereby expressly repealed; provided nothing in this act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit foreign corporations from doing business in this State, for acts committed before this act takes effect." (Laws of 28th Legislature of Texas, page 119.)

PLEADINGS OF PLAINTIFF.

The following is a synopsis of plaintiff's petition:

It alleges that about 1870 a number of persons conceived the scheme of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof, throughout the United States, including the

State of Texas; that to that end they thereafter entered into a conspiracy and, from time to time, a series of conspiracies, by and among themselves, and by and with other individuals and corporations, including the plaintiff in error, and that none of said conspiracies had been abandoned, and that each had continued and were being carried out. (Rec., p. 2.)

That about May 7, 1878, W. H. Waters and H. C. Pierce were engaged in the business of refining and selling petroleum and its products in the State of Missouri and in the State of Texas, and the Chess-Carley Company and the Standard Oil Company of Ohio, the last named company being controlled by the conspirators before named, were also engaged in the sale of petroleum and its products in the States of Missouri and Texas and elsewhere; that upon said date said named individuals and corporations, and the officers and agents of the latter in further pursuance of said conspiracy to monopolize and control the oil business, and especially for the purpose of monopolizing and controlling the oil business in a section of the United States, including the State of Texas, made and entered into a conspiracy to secure control and monopolize the oil business in said section, including the State of Texas, and to fix and control the price of oil in said territory and to eliminate and prevent all competition by and among themselves and between themselves and others in said business; that this conspiracy and the acts thereunder had been adopted by the other conspirators, including the plaintiff in error, and had not been abandoned, but was still being carried out. (Rec., 4 and 5.)

That in the accomplishment of the conspiracy and the unlawful purposes, said parties caused a corporation to be created under the laws of Missouri, under the name of the Waters-Pierce Oil Company, its charter being issued by the State of Missouri on May 7, 1878, with a capital stock

of $100,000, which was afterwards increased to $400,000. (Rec., p. 5.)

That prior to May 7, 1878, the conspirators had taken steps to secure the control of the oil business in the United States, and to that end had organized the Standard Oil Company of Ohio, and had bought the property of and secured the control of a large number of corporations and firms, and had apportioned the territory of the United States to such corporations as they chose or saw fit to use for the transaction of the oil business; that the conspirators conceived that the acquisition of all the oil business in the territory which W. H. Waters and H. C. Pierce and Chess-Carley Company were operating could best and most easily be accomplished by the formation of a corporation in which the last named parties should have stock, and said parties acquiesced in the policy and became parties to the conspiracy, and said parties and their successors and assigns, and the corporation aforesaid and its assigns and its stockholders, directors and officers had ever since then and up to the time of filing the amended petition, been parties to the conspiracy and have acquiesced in and adopted and aided in carrying out the plans formed for the consummation of the purposes of the conspiracy. (Rec., p. 5.)

That in pursuance of and as a part of the general plan and conspiracy for the monopolization of the oil business it was agreed and understood when the Waters-Pierce Oil Company was formed in 1878 that it should confine its business to the States of Texas and certain other States and the Republic of Mexico, and that it was not to attempt to do any business in any other part of the United States, or elsewhere, and it was agreed that neither the Standard Oil Company of Ohio, nor any of its subsidiary companies, nor dependent companies and none of the other companies set forth in an agreement which was set out in full in the petition, nor any company controlled by any of the conspira-

tors named, should sell any oil, products of petroleum, or do any business in the products of oil in any of the territory named as territory of the Waters-Pierce Oil Company. That this understanding and agreement had been observed and carried out and insisted upon and been treated as effective by and between all corporations, trusts, *quasi* or reputed corporations and all concerns owning or claiming to own the property, stock or business, or any part thereof, of any of the corporations primarily entering into the agreements or understandings, and their successors and assigns, from the time of the creation of the Waters-Pierce Oil Company up to the time of the filing of the amended petition, and during all such time the agreements and understandings had been so observed by and between the Waters-Pierce Oil Company and the Standard Oil Company of Ohio, and its successors, and the subsidiary companies and the other companies named, and all companies the control of which were in the Standard Oil Trustees and now controlled by the Standard Oil Company, in and with reference to the State of Texas, as to prevent all competition between said companies in said State, and to create a monopoly therein in the State of Texas, and that the officers, agents and employees of the Waters-Pierce Oil Company in Texas had observed, abided by and acted upon said understanding and agreement and had during all said time made same operative and effective, and said agreement and understanding had been observed and acted upon by the plaintiff in error from the date of its incorporation to the time of the filing of the amended petition.

That as a part of the contract, agreement, understanding and conspiracy at the times aforesaid, and as a consideration by which exclusive territory was set aside for the use, exploitation and enjoyment by said Waters-Pierce Oil Company, it agreed and contracted to purchase all its supplies of refined and unrefined oils, naval stores and other articles

in which it was authorized to deal, from the Standard Oil Company and companies controlled by it, which said contract, agreement and understanding was enforced and observed by the plaintiff in error, and had at all times been observed by it since the date of its incorporation to the time of the filing of the amended petition. (Rec., p. 6.)

After setting out what was known as the original Standard Oil Trust agreement, the details of which it is not necessary here to state, and alleging that the Waters-Pierce Oil Company, which was organized in 1878, became a party to such agreement, and that same had been acted upon and carried out by it in Texas from its organization to the time of its purported dissolution, and that a majority of its stock was held and voted, first by the Standard Oil Trustees, and afterwards by the Standard Oil Company of New Jersey, the petition further alleged that said Waters-Pierce Oil Company from a time prior to the 6th day of July, 1889, and continuously thereafter, up to May 31, 1900, did business in the State of Texas, under a permit granted it by the State of Texas. That by virtue of such permit it engaged in business in the State, established itself in every county throughout the State, and while so engaged violated the statutes of the State against illegal combinations in restraint of trade and competition and thereby incurred a forfeiture of its permit to do business in Texas. That suit was filed by the State of Texas in the District Court of Travis County for the cancellation of its permit, and that same resulted in a verdict and judgment in favor of the State cancelling such permit, and that such judgment was affirmed by the State courts of Texas and by the Supreme Court of the United States, and said corporation was thereby deprived of the right to do any business in Texas except an interstate business.

That in further pursuance of the conspiracy and for the purpose of maintaining the monopoly and control which

had been acquired by the conspirators through the operations of the Waters-Pierce Oil Company in the State of Texas, and for the purpose of fraudulently rendering ineffective the judgments of the courts of the State of Texas and the Supreme Court of the United States, the managers, officers and agents of the Standard Oil Company, the Waters-Pierce Oil Company, and its officers and H. C. Pierce and the other conspirators named, determined to go through the form of dissolving the corporation known as the Waters-Pierce Oil Company and of creating a new corporation for the holding of property and the transaction of the business of the Waters-Pierce Oil Company and carrying out the plans and conspiracies aforesaid, which was accomplished by such organization. (Rec., p. 21.)

That in the organization of the new corporation, which was done on May 29, 1900, the same name was adopted, the same amount of capital stock was fixed, and the stock distributed to the holders of stock in the old corporation in the same proportion held by them in said old corporation. That for a long time a portion of the stock in the new corporation, being a majority of the capital stock, although in fact owned by the Standard Oil Company of New Jersey, stood in the name of H. C. Pierce to cover up the conspiracy and fraud in the transactions, and many other things of like character were alleged to have been done, all being effected and enforced with the full knowledge and sanction of the plaintiff in error, and all its stockholders, and by said stockholders and for the purposes before alleged. (Rec., pp. 23-25.)

That the conduct of the business of the new corporation (which is the plaintiff in error herein), was in no sense changed, that among other things it made the same reports to the Standard Oil Company as had been made by the old company, and the same instructions were received from the said Standard Oil Company, and the same control

exercised by the later company as had been exercised over the old corporation; that the old contract and understanding and agreement about the division of territory was maintained and respected and enforced. (Rec., p. 25.)

That by and through the machinery therein and theretofore described, and in pursuance of the conspiracy to monopolize the entire oil business, it was alleged that the conspirators before named had, in addition to the corporations, concerns and business therein specifically named, taken over and acquired a large number of companies, the names of some of which were given. That the purpose of such acquisition was to prevent competition with the Waters-Pierce Oil Company, and it had had that effect; and that said companies had either been entirely put out of business or were being used and controlled so as to aid in the scheme of monopoly; and that the plaintiff in error was a party to said acquisition for said purpose, and now participates in and is a party to the arrangement, which prevents competition from said companies, and had done so ever since its incorporation. (Rec., p. 28.)

That a large number of corporations, including the plaintiff in error, were controlled by the same persons, with the acquiescence and consent of the plaintiff in error and its stockholders and officers. That by this control all competition in Texas between said companies was destroyed; that certain sections and parts of the United States were assigned to said companies for business; that the plaintiff in error was permitted to do business in Texas, and with its knowledge and consent and upon its insistence and demand all other companies under said control are excluded from Texas. That by reason of said control said companies, including defendant, are required (and plaintiff in error acquiesced in and agreed to the arrangement), to secure all the oil used and sold by them from such refineries and at such prices as are determined by that organization

and said persons, whereby a monopoly in the selling of oil is accomplished, and plaintiff in error is excluded (with its consent) from buying oil from refineries not controlled by said organization, and thereby the price is affected and increased; that by said control a large number of corporations are brought under the same management and said consolidation and affiliation is made for the purpose of and has the effect of monopolizing, controlling and affecting the business in oil and the products of petroleum in Texas, and affecting the prices in said State of said products. (Rec., pp. 29-30.)

That by virtue of all these acts and various other acts alleged to have been done, it was charged in said petition that the following unlawful results had been accomplished:

(1) The plaintiff in error is dominated and controlled by and its business dictated by the Standard Oil Company of New Jersey.

(2) A large number of individuals and corporations doing business in the sale of petroleum products, are excluded from doing business in the State and competition was lessened.

(3) The price of oil had been maintained at an exorbitant figure, being from ten to twenty-five per cent higher than that of oil sold in the territory not claimed by plaintiff in error.

(4) Competition had been suppressed and business destroyed in the State by unconscionable and unfair means.

(5) A substantially complete monopoly in petroleum products had been established, the plaintiff in error having sold during the period of ten years past, at least ninety-five per cent of all petroleum products sold. (Rec., p. 36.)

There was a prayer for the penalties provided under both the acts of 1899 and 1903, and for the cancellation of the permit of the plaintiff in error to do business in Texas. (Rec., p. 39.)

TRIAL.

The case coming on for trial defendant made a motion for change of venue. The motion was overruled. The action of the court was not assigned as error in this court, but is the subject of criticism by counsel in their briefs.

The motion for change of venue having been overruled, a trial before a jury was begun. Because of the misstatements heretofore referred to a concise synopsis of the facts proved is given. That the court may verify the charge that the briefs of plaintiff in error do not accord with the record, the names of witnesses and pages of record are indicated.

STATEMENT OF FACTS PROVED.

The State charged that on or about January 1, 1870, John D. Rockefeller and numerous others entered into a conspiracy to monopolize and control the business of refining, transporting and selling petroleum and the products thereof throughout the United States, including the State of Texas.

That said conspiracy is still in existence and is still carried out and actively prosecuted. (Rec., p. 2.)

The facts show that the conspirators began by organizing the Standard Oil Company of Ohio, January 10, 1870. (Rec., p. 396.)

May 7, 1878, they organized the Waters-Pierce Oil Company under the laws of the State of Missouri. (Rec., pp. 397, 486.)

That among the directors during the first years were Horace A. Hutchins and William P. Thompson, who were connected with the Standard Oil Co. (Rec., pp. 438-434; 435; 571.)

That at the time of the organization of the Waters-Pierce Oil Co. in 1878, the following firms and co-opartnerships who were doing business in the States of Texas, Arkansas, Missouri, Louisiana, and other territory in the Southwest, acquired interests in that corporation, whereupon competition between them ceased:

Standard Oil Company of Ohio (Rec., p. 473).
Waters-Pierce and Company (Rec., pp. 443, 497).
Chess-Carley Co. (Rec., pp. 569, 570).
M. K. & T. Tank Line (Rec., pp. 569, 570, 572).

After the organization of the Waters-Pierce Oil Company in 1878, the southern half of Missouri, all the State of Louisiana west of the Mississippi river, the entire States of Arkansas, Texas, the Indian Territory and Republic of Mexico, was assigned as the exclusive territory for the Waters-Pierce Oil Company, and a map was subsequently made in the offices of the Standard Oil Co. at 26 Broadway, New York, defining the territory of the Waters-Pierce Oil Co.

(Rec., pp. 442, 443, 448, 434, 435, 539, 579, 450.)

There has been no change in the territory parceled out to the Waters-Pierce Oil Co. since 1878 (Rec., p. 443).

In the year 1882, and in furtherance of the conspiracy charged, an arrangement called the "Standard Oil Trust Agreements" was made, which consolidated numerous competing concerns into one great pool or trust (Rec., pp. 7 to 18, 398, 399).

The following sixteen stockholders of the Standard Oil Company of Ohio became signers of the "Standard Oil Trust Agreements":

John D. Rockefeller,
William Rockefeller,
D. V. Harkness,
H. M. Flagler,
O. H. Payne,
Benj. Brewster,
O. B. Jennings,
A. M. McGregor,
W. C. Andrews,

A. J. Pouch,
J. Huntington,
D. M. Harkness,
Josiah Macey,
W. H. Macey,
W. T. Wardwell,
F. J. Vandergrift.
(Rec., pp. 15, 16, 17, 18, 396, 397.)

The following named stockholders and directors of the Waters-Pierce Oil Company also signed said agreements:
W. P. Thompson,
H. A. Hutchins.
(Rec., pp. 16, 397.)

The Standard Oil trust secured in 1882 60 per cent of the capital stock of the Waters-Pierce Oil Co. and held it down to the pretended dissolution of the said Trust in the year 1882 (Rec., p. 399).

There were nine trustees under the agreements, six of whom were stockholders of the Standard Oil Co. of Ohio, viz.:
John D. Rockefeller,
O. H. Payne,
Wm. Rockefeller,
J. A. Bostwick,
H. M. Flagler,
Benj. Brewster.
(Rec., pp. 11, 396, 397.)

The power of the Trustees over the various subsidiary companies was complete. (Rec., pp. 7 to 18.)

The scheme of the Trust Agreements contemplated the organization of corporations in several of the different States under the name of the Standard Oil Company to take over

the property of other corporations and co-partnerships coming into the Trust.

(Rec., pp. 8, 16, 17.)

Such companies were organized, among them being the—

1. Standard Oil Co. of New Jersey (Rec., p. 1011).
2. Standard Oil Co. of Kentucky (Rec., p. 1031).
3. Standard Oil Co. of Pittsburg (Rec., p. 1042).
4. Standard Oil Co. of Indiana (Rec., p. 427).
5. Standard Oil Co. of Iowa (Rec., p. 1034).
6. Standard Oil Co. of New York (Rec., p. 1057).
7. Atlantic Refining Co. (Rec., p. 1064).

The territory of each was parceled out and each had certain limits of operation, as follows:

The Waters-Pierce Oil Company as already set forth.

The Standard Oil Co. of Indiana does business in the following States:

Indiana,
Illinois,
Iowa,
Wisconsin,
Michigan,
Kansas,
South Dakota,
North Dakota,

A part of Missouri, that State being divided between it and the Waters-Pierce Oil Co.

(Rec., pp. 1024, 443, 552, 553, 575, 576, 577).

The Standard Oil Co. of New York does business in the following States:

New York,
Connecticut,
Rhode Island,
Massachusetts,
Vermont, and

New Hampshire.
(Rec., p. 1024.)

The Standard Oil Co. of Kentucky transacts business in the following States:
Kentucky,
Tennessee,
Georgia,
Florida,
Alabama,
Mississippi and a portion of Louisiana, that portion east of the Mississippi river.
(Rec., pp. 1024, 443.)

The Continental Oil Co. does business in the following States:
Colorado,
New Mexico,
Utah,
Montana, and
Wyoming.
(Rec., pp. 1024, 548.)

The territory of the Waters-Pierce Oil Company is completely surrounded but not invaded by the following companies, as shown above, viz.:
Standard Oil Co. of Indiana in northern half of Missouri and Kansas (Rec., pp. 552, 553).
Standard Oil Co. of Kentucky, Tennessee, Mississippi, and Louisiana, east of Mississippi River.
Continental Oil Co. in Colorado and New Mexico.
(Rec., pp. 539, 429.)

In the year 1892 the Supreme Court of Ohio, enjoined the Standard Oil Company of Ohio from paying any further dividends to the trustees of the Standard Oil Trust

and granted further relief (49 Ohio State Rep.), and the Trust Agreements were put in process of dissolution.
(Rec., pp. 403, 423.)

The capital stock of the Standard Oil Company of New Jersey was increased to One hundred and ten million dollars (Rec., p. 1017), and the number of directors increased from three to nine by the Trustees of the Standard Oil Trust to correspond with the number of Trustees in the Trust (Rec., pp. 1016, 11); and the Standard Oil Co. of New Jersey became the holding company instead of the Trustees of the Standard Oil Trust, one share of the capital stock of the Standard Oil Co. of New Jersey being exchanged for each trust certificate (Rec., pp. 403 to 424).

In the year 1892, when the foregoing acts were decided upon the following named composed the nine Trustees of the Standard Oil Trust:

Paul Babcock, Jr.,
J. H. Alexander,
T. C. Bushall,
W. H. Tilford,
Jas. D. Archbold,
W. H. Rogers,
O. R. Jennings,
Wm. Rockefeller.
(Rec., p. 1016.)

Of those named all except two, T. C. Bushnell and O. R. Jennings, were stockholders of the Standard Oil Company of New Jersey.
(Rec., pp. 1020, 1021, 1022.)

Pursuant to this arrangement the Standard Oil Co. of New Jersey acquired a majority of the capital stock of many corporations, including the following, and still owns same:

Waters-Pierce Oil Co.
Standard Oil Co. of Indiana.
Standard Oil Co. of New York.
Standard Oil Co. of Kentucky.
Continental Oil Co. of Iowa.
Republic Oil Co. of New York.
(Rec., p. 1024, 1025.)

During all this time they were perfecting their monopoly of the oil business, in pursuance of the conspiracy charged, by the acquisition and consolidation of rival and competing concerns throughout the United States.

The business of Cochran Lyman & Co.,
Alexander McDonald & Co.,
Peoria Tank Line Co., and
The Des Moines Oil Tank Line Company were consolidated into one concern under the name of the
Consolidated Tank Line Company (Rec., pp. 536, 537, 538, 552, 553), which was in turn absorbed by the Standard Oil Co. of Kentucky (Rec., pp. 552, 538).

The Scio Refining Co., the Cleveland Refining Co. and the business of Scofield, Shurmer and Teagle were absorbed by the Republic Oil Co., a corporation organized for the purpose of absorbing these competing concerns.
(Rec., pp. 540, 541, 542, 543, 736.)

> "The Republic Oil Co. aimed to supply the trade known as dissatisfied trade formerly supplied by Scofield, Shurmer and Teagle, and finally confined their greatest efforts to supplying the trade demanding goods made by independent companies, having no affiliation with the Standard Oil Co., commonly known as the Trust."
> (Rec., p. 543.)

The Standard Oil Co. acquired and owned a majority of the shares of stock of the Republic Oil Co. practically from the date of its organization.

(Rec., p. 1024, 1025.)

The Vacuum Oil Company of Rochester, New York, was absorbed by the Standard Oil Co., but their brands of oil were continued and the traveling salesman was retained, when soliciting orders in the territory of the Waters-Pierce Oil Company the business was turned over to that company, likewise to the Standard Oil Company when the order was secured in its territory.

(Rec., pp. 578 to 581.)

The Trustees of the Standard Oil Trust, and the subsidiary companies owned by it, occupied quarters at 26 Broadway, New York, where reports of the activities and business of each company was received.

(Rec., pp. 466, 480, 482, 565, to 568, 538, 544, 545, 548, 549, 554, 555, 557, 560, 561, 562, 563, 467, 573, 736, 737.)

The same arrangements were continued after the dissolution of the Trust Agreements, and the business at 26 Broadway was organized into departments, with various committees composed of representatives of the different companies in charge of the business. They had what was called the

Domestic Trade Committee in charge of business in the United States.

The Foreign Trade Committee was in charge of the business of all the other countries of the earth.

(Rec., pp. 438, 545, 565.)

They also had what were called:

Manufacturing Committee;
Lubricating Oil Committee;
Cooperage Committee.
(Rec., p. 438.)

Also the Marine Oil department, and the Statistical department which compiled comparative statistics of the operation of each subsidiary, based upon reports received from all over the world.
(Rec., pp. 565, 566.)

The so-called Domestic Trades Committee adjusted all disputes over territory and harmonized differences between subsidiary companies arising in their management by field officers.
(Rec., pp. 434, 435, 436, 437, 438.)

But if the Committees mentioned failed to agree, the controversy would then be referred to the Executive Committee, of which John D. Rockefeller was the head, for settlement.
(Rec., p. 438.)

None of the subsidiary companies owned by the Standard Oil Company of New Jersey sell oil in the territory of the Waters-Pierce Oil Company, in competition against it, and vice versa.
(Rec., pp. 1024, 539, 548, 551, 552, 553, 554, 450, 572, 573, 574, 575, 576, 577, 578, 579, 735.)

This division of territory between the Waters-Pierce Oil Co. and the Standard Oil Co. was agreed upon in 1878, and it has been observed down to this time.
(Rec., pp. 442, 443, 448, 449, 450.)

The Waters Pierce Oil Co. has purchased almost all of its

supplies from 1878 to the present from the Standard Oil Co.

(Rec., pp. 443, 444, 449, 450, 476, 477, 479.)

The Waters-Pierce Oil Co. on the other hand established no refineries in Texas or in the United States.

(Rec., pp. 472, 473, 444, 448, 449, 450, 504.)

Neither the Standard Oil Company, nor any of its subsidiaries sold oil in Texas in competition with the Waters-Pierce Oil Co.

(Rec., pp. 736, 737, 1023, 1024, 955.)

The Standard Oil Co. owned refineries in Texas, but these refineries did not engage in the sale of oil to the trade in competition with the Waters-Pierce Oil Co.

(Rec., pp. 737, 477, 472, 473, 892, 893.)

On the 15th day of June, 1897, the Waters-Pierce Oil Co. was convicted of violating the Anti-trust laws of Texas and its permit to do business in Texas cancelled, which judgment was affirmed by the Supreme Court of the United States.

(Rec., pp. 1119, 1082, 1083, 1089.)

At the time of this judgment the Standard Oil Co. owned 2,748 shares out of the 4,000 capital stock of the Waters-Pierce Oil Co,, and H. Clay Pierce owned the balance.

(Rec., p. 458.)

H. Clay Pierce undertook to settle his differences with the State of Texas, so as to permit the Company to continue business in the face of the mandate of the Supreme Court of the United States, when he was informed that no company controlled by the Standard Oil Company would be permitted to do business in Texas. He thereupon decided to organize a new company, in which he would hold all the

stock. Under those conditions it was agreed that he should have a new permit.

(Rec., pp. 490, 491, 492.)

Pierce entered into an arrangement with the Executive Committee of the Standard Oil Co., that a new corporation should be organized, in which the Standard Oil Company would own the same interest as in the old company with the difference that the stock should stand on the books in Pierce's name in order to conceal the true ownership thereof.

(Rec., pp. 490, *et seq.*)

On May 28, 1900, the old Waters-Pierce Oil Co. was dissolved by unanimous consent of the stockholders, that is, the Standard Oil Co. and H. Clay Pierce, which was filed May 29, 1900.

(Rec., pp. 1083, 1084.)

On May 29, 1900, a new charter for a new corporation was granted by the State of Missouri, under the same name as the old Waters-Pierce Oil Co., with the same purposes, and with the same capital stock, reciting on its face that H. C. Pierce had subscribed for 3,996 of the 4,000 shares of the capital stock.

(Rec., p. 1085.)

The charter of the new Waters-Pierce Oil Co., plaintiff in error in this case, was filed with the Secretary of State of the State of Texas, on May 31, 1900 (Rec., p. 1087), and a permit was granted to it authorizing it to transact business in Texas for a period of ten years.

(Rec., p. 1088.)

On May 29, 1900, a letter was prepared by the old Waters-Pierce Oil Co. to all of its employees notifying them of the dissolution of the company and discharging them, on

the afternoon of May 31, 1900, but instructing them to hold all the property subject to the order of H. C. Pierce, and to continue making sales.

(Rec., p. 984.)

On the same day another letter was prepared by H. C. Pierce, President of the new Waters-Pierce Oil Co., notifying all the agents of the old Waters-Pierce Oil Co. that the new company had purchased all of the property of the old company, and that they were thereby employed in the same capacity and at the same salary as theretofore.

(Rec., pp. 985, 582.)

The new company succeeded to the plant and business of the old company.

(Rec., p. 506.)

Some of the employees in Texas were not even notified of any change until sometime after it occurred.

(Rec., p. 997.)

Others received the letter discharging them and the letter hiring them over again in the same mail.

(Rec., p. 582.)

The only change which took place in the business, by virtue of the dissolution and re-organization, was noticed in the fact that sometime after the reorganization the company sent out a rubber stamp with which the sentence "Incorporated under the laws of Missouri in 1900," was used to stamp the stationery.

(Rec., p. 582.)

No change was made in the territory occupied by the old company.

(Rec., pp. 492, 445, 448, 449.)

The new company continued to purchase its supplies from the Standard Oil Company as was the custom of the old company.

(Rec., p. 492.)

Shortly after the 3,996 shares of the capital stock of the new company was issued to H. C. Pierce he transferred 2,748 shares in blank to a representative of the Standard Oil Co. in accordance with an agreement had with the Executive Committee of the Standard Oil Co. before the organization of the new company.

(Rec., pp. 490, 491, 492, 487, 451, 452, 453, *et seq.*)

But the stock books did not show the transfer; the stock continued to stand in H. C. Pierce's name until 1904, when the Standard Oil Co. had it transferred on the books of the company to M. M. Van Bueren.

(Rec., pp. 486 *et seq.*)

The new Waters-Pierce Oil Co. continued to send reports of its business, in almost every detail to 26 Broadway, and received instructions regarding the management of its business from the Standard Oil Company.

(Rec., 561, 562, 563, 568, 593, 594, 596, 597, 482, 466, 467, 468, 469, 470, 471, 472, 1091 to 1117, 605 to 624.)

Instead of sending the reports to the Standard Oil Co. direct as before, the new company addressed R. H. McNall, as "Commercial Agent" at 26 Broadway. McNall was chief clerk of H. M. Tilford, a Standard Oil officer, who was a director of the old Waters-Pierce Company.

(Rec., 447, 466, 467, 468, 561, 588.)

McNall continued to occupy the same office with H. M. Tilford at 26 Broadway after his appointment as Commercial Agent of the Waters-Pierce Oil Co.

(Rec., pp. 468, 560, 561.)

But his mail was addressed to him at 75 New Street, New York, which was the back door entrance of 26 Broadway.

(Rec., pp. 468, 562, 587.)

McNall was supplied with stationery of the Waters-Pierce Oil Co., which was distributed through the various departments of the Standard Oil Co., at 26 Broadway, and when they desired to communicate with the Waters-Pierce Oil Co. as to the conduct of their business, the letter would be written on Waters-Pierce Oil Co. stationery, and sent to McNall to be signed by him and then returned to the other Standard Oil Departments to be mailed out.

(Rec., pp. 567, 568.)

The Standard Oil Co. sent its auditors to check up and audit the books of the Waters-Pierce Oil Co.

(Rec., pp. 1027, 1028, 1029, 1030, 1031, 924.)

In sending an auditor in 1901 to check the accounts of the Waters-Pierce Oil Co., Wade Hampton, General Auditor of the Standard Oil Co., in a letter to the company, used the following language:

> "Our Mr. Conrey will probably arrive at your office on Monday next, the 11th inst., to take up the audit of the books and accounts of your general office. For reasons which you undoubtedly will appreciate, it is best that Mr. Conrey be considered an employe of your company during his examination.
>
> "Therefore kindly enter his name on your pay roll from the date of his arrival at $191.67 per month.

"Also kindly pay what expenses he is under from the time he left New York."

The same practice was indulged with subsequent auditors.

(Rec., pp. 1028 to 1031, 481.)

Among the numerous reports sent to McNall touching the business of the Waters-Pierce Oil Co. may be noticed:

Sales Reports (Rec., pp. 593, 1098).

Cash Reports (Rec., pp. 593, 594).

Monthly, semi-annual and annual reports covering the entire sales of the company.

(Rec., pp. 593, 615, 1094, 1106.)

Reports of construction of buildings and plant equipment.

(Rec., p. 594.)

Reports of salaries paid employees of Waters-Pierce Co.

(Rec., p. 594, 607, 623.)

Comparative statements of sales compared to year before.

(Rec., p. 595, 624.)

Statement showing cost of barreling and marketing of oil.

(Rec., pp. 595, 621, 622, 1104.)

Report of sales increase or decrease.

(Rec., p. 595.)

Report showing Waters-Pierce Oil Co. selling price of oils.

(Rec., pp. 596, 1094.)

Report of dividends declared by the Waters-Pierce Oil Co.

(Rec., pp. 596, 605, 606.)

These reports were shown to parties at 26 Broadway.

(Rec., pp. 597, 561, 562, 563.)

These reports with others were sent to the appropriate departments of the Standard Oil Co.

(Rec., pp. 561, 562, 563.)

The Waters-Pierce Oil Co. sold the trade-mark brands of lubricating oils manufactured by the Standard Oil Co. The Standard Oil Company fixed the minimum selling prices of such oils.

(Rec., pp. 689, 609, 1090, 1091, 1094, 1096.)

The Standard Oil Co. had contracts with vessels for marine and lubricating oils; all such vessels that touched at Galveston, Texas, were supplied with such oils by the Waters-Pierce Oil Co., on requisition from the Standard Oil Co.

(Rec., pp. 668, 634, 963.)

On all other oils outside of contract oil delivered to vessels the Waters-Pierce Oil Co. charged the steamers such a price that would allow the marine oil department of the Standard Oil Co. a commission of 5 per cent on all such sales.

(Rec., p. 608.)

In the year 1907 the Louisiana and Texas Saw Mill Co. made contracts in Kansas City, Mo., with the Standard Oil Co. to supply oil for its plant at Kennard, Texas, the Standard Oil Co. turned the contract over to the Waters-Pierce Oil Company to be filled.

(Rec., pp. 850 to 869, 663, 664.)

In 1894 the Waters-Pierce Oil Co. bought out the Eagle Refining Co., an independent plant in Texas, and continued to operate it as an independent concern, until December 31, 1903, the true owership being concealed.

(Rec., pp. 744, 752, to 780.)

Oil was selling at Dallas, Texas, at 9½ cents per gallon under competition at the time the purchase was made. It was afterwards advanced to 22 cents per gallon.

(Rec., pp. 744.)

In 1894 the Waters-Pierce Oil Co. purchased another competitor at San Antonio, Texas, called The Texas Oil and Gasoline Co., and operated it as an independent concern until 1904.

(Rec., pp. 696 to 735.)

The Texas Oil and Gasoline Co. was used to sell oil to customers who would not patronize the Waters-Pierce Oil Co., and to harass others who undertook to sell oil in competition with the Waters-Pierce Oil Co.

(Rec., 719 *et seq.*)

The Waters-Pierce Oil Co. destroyed competition by many and devious methods; information of competitor's shipments obtained through railway employees and otherwise.

(Rec., 555, 550, 551, 720, 435, 436, 1097, 1099, 1117, 1118.)

Gave secret rebates to customers not disposed to trade with them.

(Rec., 729, 1127 to 1134, 550, 551.)

The old Waters-Pierce Oil Co. did 98 per cent of the oil business in its territory.

(Rec., p. 478.)

The new Waters-Pierce Oil Co. has done from 80 to 85 per cent of the oil business in its territory.

(Rec., p. 478.)

The new company, plaintiff in error, started in 1900 with a capital stock of $400,000.00

(Rec., p. 507.)

After seven years it owned physical properties valued at twelve million dollars, and assets worth from forty to fifty millions.

(Rec., pp. 507, 506.)

All this has been acquired notwithstanding dividends of from 600 to 700 per cent annually have been declared upon its capital stock and paid.

(Rec., p. 472.)

Dividends amounting to 100 per cent were declared so frequently as to make no impression upon the mind of its President.

(Rec., p. 493.)

Assets in Texas one million and half dollars, half of which was put in since 1900.

(Rec., p. 954.)

The testimony of two witnesses alone, that of H. Clay Pierce, the President, and R. H. McNall, Commercial Agent of plaintiff in error, makes out a complete case against plaintiff in error under every issue on which the jury found it guilty.

(Rec., pp. 440, *et seq.*, 585 *et seq.*)

THE CHARGE OF THE COURT.

After the introduction of the evidence the court submitted the case to the jury upon the following charge:

"Gentlemen of the Jury:

"In this case the State of Texas, as plaintiff, has sued

the Waters-Pierce Oil Company, a private corporation chartered under the laws of the State of Missouri and doing business in Texas by virtue of a permit issued to it by the State of Texas, on May 31, 1900, as defendant, to cancel said permit and to recover penalties for violations of the anti-trust laws of Texas which the State alleges the defendant has committed on each and every day from May 31, 1900, to April 29, 1907.

"The State alleges that on or about January 1, 1870, John D. Rockefeller, John P. Archbold, H. H. Rogers, Henry M. Flagler, and a number of other persons conceived the scheme of monopolizing and controlling the business of refining, transporting and selling petroleum and the products thereof throughout the United States, including the State of Texas, and that said persons to that end and for that purpose entered into a conspiracy among themselves and with other individuals and corporations, including the defendant corporation, which conspiracy the State alleges continued in force and effect from the date of its formation until the date of the filing of the State's second amended petition in this case, and the State further alleges that in pursuance of said alleged conspiracy the defendant has done various acts and entered into various agreements which constitute violations of the anti-trust laws of Texas.

"The State further alleges that the defendant's predecessor, the Waters-Pierce Oil Company, incorporated in 1878, on or about the 5th day of October, 1894, entered into a contract with the Eagle Refining Company, A. W. Clem and certain other individuals named in its petition, by the terms of which defendant acquired the property of said Eagle Refining Company, situated in the city of Dallas, Texas, and the right to operate its business under the name of the said Eagle Refining Company. It further alleges that the defendant did, subsequent to May 31, 1900, operate said Eagle Refining Company and maintain the plant thereof at Dallas, as an apparently competing concern for various purposes prohibited by the anti-trust laws.

"The State further alleges that, in the year 1896, the defendant's said predecessor bought out the business of

the Texas Oil and Gasoline Company and of one Roy Campbell, who were at that time doing business in the city of San Antonio, Texas, and elsewhere, and entered into contracts and agreements with the said Texas Oil and Gasoline Company and Roy Campbell, whereby said Texas Oil and Gasoline Company was thereafter to be operated under said name by defendant as an apparently competing concern with defendant at San Antonio, in the sale of the products of petroleum. It further alleges that said Texas Oil and Gasoline Company was operated by defendant as a concern apparently competing with it at San Antonio subsequent to May 31, 1900, for various purposes in violation of the anti-trust laws of the State. For full particulars of the State's allegations you are referred to its second amended original petition.

"The defendant denies all and singular the allegations of the State, and in addition to various of her special defenses, pleads specially that, if it has entered into any of the agreements or committed any of the acts alleged by the State, none of same constitute violations of the anti-trust laws of Texas, because said agreements were made and said acts done (if at all) solely with reference to subjects of interstate commerce. For full particulars of defendant's allegations, you are referred to its third amended original answer.

"As the law of the case you are instructed as follows, viz:

"I. The burden of proof rests upon the State to establish the affirmative of the issues which will hereafter be submitted in this charge for your consideration by a preponderance of the evidence, and you will find in favor of the defendant on each issue so submitted for your consideration, except such issue or issues, if any, as you find that the State has established by a preponderance of the evidence, and you will return a general verdict for the defendant, unless you find that the State has established by a preponderance of the evidence, some combination or combinations of facts which will entitle it to recover under the law as it is given you in charge by the court.

"II. The statute known as the Anti-trust Law of 1899 was in force on May 31, 1900, and thereafter remained continuously in force until March 31, 1903.

"For the purposes of this charge you are instructed that this act made it unlawful for any corporation transacting or conducting any kind of business in this State to enter into, or become a party to, any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise or to control or limit in Texas the trade in any article of manufacture or merchandise.

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this State to bring about or permit any union or combination of its capital, property, trade or acts with the capital, property, trade or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

"The statute known as the Anti-trust Law of 1903 became effective on March 31, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes, viz.:

"1. To create or which may tend to create or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this State.

"2. To fix, maintain or increase the price of merchandise in Texas.

"3. To prevent or lessen competition in Texas in the sale of merchandise.

"4. To abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof.

"Said statute of 1903 further defines a monopoly to be a combination or consolidation of two or more corporations when effected in any of the following methods, viz.:

"1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create, a trust as above defined.

"2. When any corporation acquires the shares or certificates of stock, franchise or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"III. Oil, all other products of petroleum, and goods, wares or merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the State of Texas and caused to be transported to its agents or others within the State, are the subjects of interstate commerce when they enter this State, and so remain until such commodities are removed from the original tanks, vessels or other packages in which they are imported into the State and become mixed with the common mass of property of similar character in this State. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, pool or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsi-

cana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside the State and transported into the State and removed from the original packages or vessels in which it was brought into the State and mingled with other property of similar character in the State, is the subject of interstate commerce, but on the contrary is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this State.

"IV. A corporation such as defendant can only act through its agents and servants, but such a corporation is not liable for all of the acts of its agents or servants. It is liable, however, for the acts done in the scope of their employment and agency, and is also liable for the acts of its agents which it has authorized such agents to perform, and it is also liable for the unauthorized acts of its agents, if any, which have been knowingly acquiesced in or ratified by the governing body of said corporation.

"V. Much evidence has been introduced before you relating to the doings and agreements of the agents of corporations other than defendant, and to the doings and agreements of defendant's predecessor's agents prior to June 1, 1900, and to the doings and agreements of defendant's agents, and the agents of other corporations, outside the State of Texas, and to the doings and agreements of individuals both prior and subsequent to June 1, 1900, and both outside and within the State of Texas. None of this evidence is competent or can be considered by you against the defendant, except within the limitations and for the purposes hereinafter stated, viz.:

"If you find from a preponderance of the other evidence in the case, independent of all declarations or statements made by any person or persons, except their evidence given while testifying by deposition or personally as witnesses on the trial of this case, that on June

1, 1900, there was formed or existed an agreement between the governing officers of defendant and the governing officers of any of the other corporations alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, or between the governing officers of defendant and any of the individuals alleged in the State's petition to be co-conspirators with defendant relating to the management of defendant's business, then you may consider for what, if anything, you think it worth, such acts or declarations of all the parties to said agreement, if any, and such acts and declarations of their authorized agents, if any, as were done or made, as the case may be, during the existence of said agreement, if any, and in furtherance of its execution, for the purpose of determining the character of said agreement, and whether or not it contemplated a violation by defendant of the anti-trust laws of Texas.

"You may further consider for what, if anything, you think it worth as tending to show or explain the course of defendant's dealing in Texas, said evidence, if any, of what it did through its duly appointed and authorized agents, if any, outside the State.

"None of said evidence can be considered by you against the defendant for any other purpose whatsoever, and none of it can be so considered by you against the defendant for said purposes, except such of it, if any, as you think proper to be considered when tested by the rules above stated relating to its competency.

"VI. No agreement made by the defendant outside the State of Texas, to violate the anti-trust laws of Texas, if any such there were, can be made the basis for forfeiting its permit to do business in Texas, or for imposing penalties upon it, unless such agreement was executed or attempted to be executed in Texas by the duly authorized agents of defendant; but inasmuch as the undisputed evidence in the case shows that the defendant has continuously maintained its agents in this State and prosecuted its business therein since May 31, 1900, you will be authorized to convict it of violating the anti-trust laws of Texas, if you find from a pre-

ponderance of the evidence in favor of the State on the issues submitted for your consideration in paragraphs VII, VIII, IX, X or XI of this charge.

"VII. If you find from a preponderance of the evidence that he defendant company, acting through its duly appointed and authorized agents, entered into or became a party to an agreement or understanding with the Standard Oil Company of New Jersey, on June 1, 1900, to fix or regulate the price in Texas of oil refined from petroleum, and if you further find from a preponderance of the evidence that the defendant company remained or continued to be a party to said agreement or understanding, if any, and persisted in carrying same out in Texas, if any, through its duly authorized agents on June 1, 1900, or on any other date or dates subsequent to June 1, 1900, and prior to March 31, 1903, and if you further find from a preponderance of the evidence that the oil with reference to which said agreement or understanding, if any, was so made and carried out, was the subject of local as distinguished from interstate commerce, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph seven of the court's charge. You are instructed in this connection that if you find in favor of the State on the issue above submitted for your consideration in this paragraph of the charge, each day embraced between May 31, 1900, and March 31, 1903, during which the defendant remained a party to the agreement or understanding herein mentioned, if there were any such agreement or understanding, and if it remained a party to same on any of said days, would constitute a separate and distinct violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant was on June 1, 1900, or on some date subsequent thereto and prior to March 31, 1903, through the action of its duly appointed and authorized agents, a party to an agreement or understanding with the Standard Oil Company of New Jersey to fix or regulate the price in Texas of oil refined

from petroleum, and if you do not further find from a preponderance of the evidence that the oil with reference to which defendant entered into said agreement or understanding, if any such there were, was the subject of local, as distinguished from interstate commerce, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph seven of the court's charge.

"VIII. If you find from a preponderance of the evidence that on June 1, 1900, or on any date subsequent thereto, and prior to March 31, 1903, the defendant acting through its duly appointed and authorized agents, had brought about or permitted any combination or union of its capital with the capital of the Standard Oil Company of New Jersey, whereby the price in Texas of oil refined from petroleum, other than oil which was the subject of interstate, as distinguished from local commerce, was sought to be fixed or regulated, or whereby the price in Texas of such oil would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph eight of the court's charge. In this connection you are instructed that if the defendant became a party to a pool of the character mentioned in this paragraph of the charge, each day between May 31, 1900, and March 31, 1903, that it remained a party to such pool, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas. If you do not find from a preponderance of the evidence that on June 1, 1900, or that on some date subsequent thereto and prior to March 31, 1903, the defendant acting through its duly appointed and authorized agents had brought about or permitted a combination or union of its capital with the capital of the Standard Oil Company of New Jersey, and if you do not further find from a preponderance of the evidence that by said combination or union, if such there were, the price in Texas of oil

refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, was sought to be fixed or regulated, or that thereby the price in Texas of such oil was reasonably calculated to be fixed or regulated, or that thereby the trade in such oil in Texas was sought to be controlled or limited, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph eight of the court's charge.

"IX. If you find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit in this State of the business of selling oil refined from petroleum, other than oil which was the subject of interstate as distinguished from local commerce, or to fix, maintain or increase the price of such oil in Texas, or to prevent or lessen competition in Texas in the sale of such oil, and that the defendant remained or was a party to and acted under such combination, if such there were on March 31, 1903, or any date subsequent theerto and prior to April 29, 1907, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph nine of the court's charge. In this connection you are instructed that if the defendant became a party to a trust of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to and acted under such trust, if there were any such days, would constitute a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the defendant, acting through its duly appointed and authorized agents, entered into a combination of its capital with the capital of the Standard

Oil Company of New Jersey, for the purpose of creating in Texas, or which tended to create or carry out in Texas, restrictions in the free pursuit in this State of the business of selling said character and kind of oil, or to fix, maintain, or increase the price of such oil in Texas, or to prevent or lessen competition in Texas, in the sale of such oil, and that the defendant remained or was a party to, and acted under such combination, if such there were subsequent to March 30, 1903, and prior to April 30, 1907, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph nine of the court's charge.

"X. If you find from a preponderance of the evidence that the direction of the affairs of the defendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, and that they were placed under such common management or control, if any, by their respectively authorized officers, under such circumstances that such common management or control, if such there were created or tended to create or carry out restrictions in the sale in Texas of oil of the kind and character mentioned in the last preceding paragraph of this charge, or to fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph ten of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the direction of the affairs of the de-

fendant corporation and the affairs of the Standard Oil Company of New Jersey were under the same management or control on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, and that they were brought under such a common management or control, if any, by their respectively authorized officers under such circumstances that such common management or control, if such there were, created or tended to create or carry out restrictions in the sale in Texas of such oil, or fix, maintain or increase the price in Texas of such oil, or to prevent or lessen in Texas the competition in the sale of such oil, you will say by your verdict, we the jury find for the defendant on the issues submitted for our consideration in paragraph ten of the court's charge.

"XI. If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on any date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the State and say by your verdict, we the jury find for the State on the issues submitted for our consideration in paragraph eleven of the court's charge. In this connection you are instructed that if the defendant entered into a monopoly of the character mentioned in this paragraph of the charge, each day between March 30, 1903, and April 29, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas.

"If you do not find from a preponderance of the evidence that the Standard Oil Company of New Jersey had on March 31, 1903, or on some date subsequent thereto and prior to April 29, 1907, acquired a majority of the capital stock of the defendant corporation, and if you do not further find from a preponderance of the evidence that said stock was acquired and combination effected, if it were at all, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey of preventing or lessening the competition in the sale in Texas of said character and kind of oil, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will say by your verdict, we the jury find in defendant's favor on the issues submitted for our consideration in paragraph eleven of the court's charge.

"XII. The evidence introduced before you does not show with sufficient definiteness that the defendant has, since May 31, 1900, acted under or persisted in the performance of either the contract with Clem and the Eagle Refining Company and others, or the contract with Roy Campbell and the Texas Oil and Gasoline Company, in such a manner as to violate the Anti-trust Laws of 1899 or 1903. You are therefore instructed to find in defendant's favor on the issues pleaded by the State with reference to said contracts.

"XIII. Evidence has been introduced before you tending to show that the defendant has given rebates and discounts in the course of its dealings; evidence has also been introduced before you tending to show that defendant has made contracts and entered into understandings other than those which have been submitted for your consideration in paragraphs seven to eleven, inclusive, of this charge. Evidence has also been introduced before you tending to show the general course of dealings of defendant in Texas and elsewhere, including some of its business methods in meeting competition. You are instructed that none of this evidence shows or tends to show any violation of the

anti-trust laws of Texas, unless it tends in some degree to establish some one or more of the issues submitted for your consideration in the last above mentioned paragraph of this charge; and you are therefore instructed to acquit the defendant and return a general verdict for it—notwithstanding any and all of said evidence, unless you find in favor of the State on the issues submitted for your consideration in some one or more of said paragraphs of the charge.

"XIV. If you convict the defendant under the foregoing instruction of any violation or violations of the anti-trust law of 1899, you will specify in your verdict the date or days for which it is convicted of having violated said law, and will further specify in your verdict that for said violation or violations, if any you find, that its permit to do business in Texas shall be forfeited, and the amount of money which shall be adjudged against it as penalties for said violations, if any. In fixing the penalties, if any, which you assess against the defendant for any violation of which you may convict it, of the anti-trust law of 1899, you will fix same at not less than two hundred dollars, or more than five thousand dollars per day for each day you find it has so violated the law. If you convict the defendant of any violations of the anti-trust law of 1903, you will specify in your verdict the date or days for which it is so convicted and further specify therein that as a result of said conviction, its permit to do business in Texas shall be forfeited, and the sum of money that shall be adjudged against it as a penalty for such violation, fixing said sum at fifty dollars per day for each and every day that you convict it of having violated said law.

"XV. In order to aid you in preparing your verdict in proper form, when you have reached same, the following forms of verdicts are submitted for your consideration:

"1. If you find in favor of the State on all of the issues submitted to you and for the entire time for which penalties are claimed by the State against the

defendant in its petition, you will say: 'We the jury find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for the penalties at.....dollars; and we find for the plaintiff against the defendant on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days and fix the penalties at seventy-four thousand four hundred dollars. We further find that the permit of the defendant to do business in the State of Texas should be canceled. We find for the defendant upon all the issues made by the pleadings and not submitted in the charge of the court.'

"2. If you find in favor of the State on some of the issues submitted for your consideration, relating to the alleged violation of the Anti-trust Law of 1899, and in favor of the State with reference to some of the alleged violations of the Anti-trust Law of 1903, you may use the following form of verdict:

" 'We the jury find in favor of the State on the issues submitted for our consideration in the following paragraphs of the court's charge:

" 'We further find that the defendant violated the anti-trust laws of Texas on the following days embraced between May 31, 1900, and March 31, 1903.

" 'We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of .....dollars. We further find that the defendant violated the Anti-trust Laws of 1903, on the following days embraced between the 30th day of March, 1903, and the 29th day of April, 1907.

" 'We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited, and that penalties should be imposed upon it in the amount of.....dollars. On all other issues raised by the pleadings, we find in favor of the defendant.'

"3. If you find in favor of the State with reference to some or all of the alleged violations of the Anti-trust Law of 1899, submitted for your consideration, and if you find in favor of the defendant on other of said alleged violations, and if you find in favor of the defendant on the issue of all of the alleged violations of the Anti-trust Law of 1903, you may use the following form of verdict:

" 'We the jury find in favor of the State on the issues submitted for our consideration in the following paragraph of the court's charge..... We further find that the defendant has violated the anti-trust laws of Texas on each of the following days embraced between May 31, 1900, and March 31, 1903,.....; we further find that because of said violations the permit of the defendant to do business in Texas should be forfeited and penalties should be imposed upon it in the amount of.....dollars. We further find in defendant's favor on all alleged violations of the Anti-trust Laws of 1903, and on all other issues made by the pleading.'

"4. If you find in defendant's favor on all issues submitted for your consideration relating to its alleged violation of the Anti-trust Laws of 1899, but find in favor of the State on all or some of the issues relating to defendant's alleged violation of the Anti-trust Law of 1903, you may use the following form of verdict: 'We the jury find in defendant's favor on all issues submitted for our consideration relating to its alleged violation of the Anti-trust Laws of 1899, but find in favor of the State under the following paragraphs of the court's charge,....., for alleged violations of the Anti-trust Laws of 1903. We further find that the defendant has violated said anti-trust laws on each of the following days embraced between March 30, 1903, and April 29, 1907,..... We further find that on account of said violations the permit of the defendant to do business in Texas should be forfeited,

and that penalties should be imposed upon it in the sum of.....dollars.'

"5. If you desire to return a general verdict for defendant you may use the following form of verdict: 'We the jury find for the defendant.'

"XVI. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to their testimony; but you are bound to take the law as it is given you in charge by the court and to be governed thereby in arriving at your verdict." (Rec., pp. 284-294.)

THE VERDICT.

The verdict of the jury was as follows:

"We the jury find for the plaintiff against the defendant on each of the issues submitted to us for each of the days between May 31, 1900, and March 31, 1903, being 1033 days, and for penalties, 1,549,500.00 dollars.

"And we find for the plaintiff against the defendant on each of the issues submitted for each of the days between April 1, 1903, and April 29, 1907, being fourteen hundred and eighty-eight days, and fix the penalties at seventy-four thousand four hundred dollars.

"We further find that the permit of the defendant to do business in the State of Texas should be canceled.

"We find for the defendant upon all issues made by the pleadings and not submitted in the charge of the court."

THE JUDGMENT.

The court rendered judgment for the State in accordance with the verdict for $1,623,900, and a cancellation of the defendant's permit to do business in this State.

Rec., pp. 314-315.

APPEAL.

From the judgment of the District Court the defendant corporation prosecuted an appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas. The Court of Civil Appeals affirmed the judgment of the District Court in an opinion which after setting forth the charge of the trial court and the verdict of the jury, found:

> "There is evidence in the record which supports the findings of the jury and we find the facts to be as found by the verdict."

OPINION.

The remainder of the opinion was as follows:

> "1. Assisted by elaborate briefs and arguments submitted by able counsel on both sides, this court has given to this important case earnest and careful consideration. The volume of business on our docket and the great number of questions presented preclude extended consideration in this opinion of many of the questions raised in appellant's brief. We therefore announce, in general terms, our conclusion to the effect, that it is *not* shown that error was committed in overruling appellant's application for a change of venue, in various rulings upon exceptions to pleadings, and as to admissibility of testimony.
>
> "A majority of the court also hold that no positive error has been assigned upon the charge of the court. The writer of this opinion is of a different view concerning the eleventh section of the charge, and concurs with counsel for appellant in their contention that it was calculated to mislead the jury into the belief that they could find against the defendant upon the issues therein submitted, regardless of whether it had any knowledge of, participated with, or aided or abetted the Standard Oil Company in the wrongful conduct therein referred to. The provision of the Anti-trust Statute of March 31, 1903, upon which the charge in question

was evidently founded, seems to be addressed, in the main, against the corporation which acquires stock or other property of another corporation with the intention of using it for the purpose specified in the statute and it can not properly be construed to include the corporation whose stock or property has been acquired, and subject it to the penalties prescribed by the statute, unless that corporation is, in some manner, responsible for the unlawful acts of the acquiring corporation.

"These are my individual views, and the other members of the court do not concur in the construction placed by me upon the charge. However, we are all agreed that, if the charge in question be erroneous, it affords no ground for reversal, because the jury found that appellant had violated other provisions of the Anti-trust Act of 1903, and awarded only one penalty for each day's violation. Having found for the State on these other issues, if the verdict had been in appellant's favor on the issues submitted by the charge under consideration, the judgment should have been the same; and, therfore, if that section of the charge was erroneous, such error is now harmless and immaterial.

"In reference to the assignment of error complaining of the order of the court appointing a receiver, it is sufficient to say that appellant has exercised its right to prosecute a separate appeal from that order, and this court, in considering that appeal, has decided against appellant. It is not entitled to have the order appointing a receiver reviewed by this court twice or in two distinct proceedings.

"2. The constitutionality and validity of the Anti-trust Acts of May 25, 1899, and March 31, 1903, have been vigorously assailed in numerous respects. We overrule these objections and hold that these statutes authorize and sustain this suit. (State vs. Laredo Ice Company, 96 Texas, 467; Waters-Pierce Oil Co. vs. The State, 44 S. W., 936.)

"The contention that these statutes are too indefinite and uncertain in the particulars involved in this case is not regarded as tenable. The Sherman Anti-trust Law enacted by Congress is not more definite and specific

than these statutes, and that law has stood the test against similar objections in the Supreme Court of the United States. (United States vs. Knight Company, 156 U. S., 1; United States vs. Trans-Missouri Freight Association, 166 U. S., 291; United States vs. Joint Traffic Association, 171 U. S., 505; Hopkins vs. United States, 171 U. S., 578; Anderson vs. United States, 171 U. S., 604; Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211; Montague & Co. vs. Lowry, 193 U. S., 38; Northern Securities Company vs. United States, 193 U. S., 196.)

"3. This suit was instituted on September 22, 1906, and the defendant interposed a special exception to the petition in so far as it sought to recover penalties for alleged violation of the anti-trust laws of this State prior to the 22d day of September, 1904, for the reason that it appeared from the face of the plaintiff's petition that the right to recover such penalties accrued more than two years before the suit was filed; and was, therefore, barred by the statute of limitation of two years, as prescribed in Article 219 of the Code of Criminal Procedure of this State. That exception was overruled, and the court refused to give the jury a special instruction, requested by appellant, announcing and applying the same proposition of law. These rulings of the trial court are assigned as error, and present one of the most important questions in the case. Chapter 1 of Title 4 of the Code of Criminal Procedure is headed thus: 'The time within which criminal actions may be commenced.' Article 219 reads as follows: 'For all misdemeanors an indictment or information may be presented within two years from the commission of the offense and not afterward.'

"By the Penal Code offenses which are punishable by pecuniary fine only are designated misdemeanors; and appellant's contention seems to be that the things condemned by the Act of May 25, 1899, upon which this suit in part is based, constitute misdemeanors; and that, although civil in form, the suit is criminal in nature and barred by Article 219 of the Code of Criminal Procedure. It is also contended that the pecuniary

penalties imposed by the Act of March 31, 1903, constitute part of the punishment prescribed by that act, and that the suit for the penalties accruing thereunder constitutes a criminal case, and is barred by Article 218 of the Code of Criminal Procedure, which bars prosecutions for felonies.

"The second, third, fourth and sixth sections of the Act of May 25, 1899, declare that all persons, firms, corporations or associations of persons who violate those sections 'shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to the penalties prescribed in this act.' The eleventh section states that all who do the things therein condemned shall be 'adjudged a monopoly and be subject to all the pains and penalties provided in this act.' The seventh section provides for the forfeiture of the charter of any domestic corporation and permit to do business granted to any foreign corporation for violations of the statute. The fifth section reads as follows: 'Any person, partnership, firm or association, or any representative or agent thereof, or any corporation or company, or any officer, representative or agent thereof, violating any of the provisions of this act, shall forfeit not less than two hundred dollars nor more than five thousand dollars for every such offense, and each day such person, corporation, partnership or association shall continue to do so shall be a separate offense, the penalties in such cases to be recovered by an action in the name of the State at the relation of the Attorney-General or the district or county attorney; the moneys thus collected to go into the State treasury, and to become a part of the general fund, except as hereinafter provided.'

"The pertinent part of the ninth section is expressed in these words: 'It shall be the duty of the Attorney-General and the prosecuting attorney of each district or county, respectively, to enforce the provisions of this act. The Attorney-General and the prosecuting attorney shall institute and conduct all suits begun in the district courts, and upon appeal the Attorney-General shall prosecute said suits in the Courts of Civil Appeals and Supreme Court.'

"The first section of the Anti-trust Act of March 31, 1903, defines a trust. The second section defines a monopoly, and the third section prescribes what act shall constitute a conspiracy in restraint of trade. The fourth section declares all trusts, monopolies and conspiracies in restraint of trade to be illegal. The fifth, sixth and seventh sections make provision for the forfeiture of charters of domestic corporations violating that act, and the eighth section makes a similar provision in reference to the permit of foreign corporations to do business in this State. The seventh and tenth sections use the word 'convicted,' but the seventh relates to the subject of the forfeiture of charter rights, and the tenth to the subject of forfeiture of a foreign corporation's right to do business in the State, which shows that the Legislature did not have in mind a proceeding by indictment or criminal information. The eleventh section reads as follows:

> " 'Each and every firm, person, corporation or association of persons who shall in any manner violate any of the provisions of this act shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the State of Texas in any county where the offense is committed or where either of the offenders reside, or in Travis county, and it shall be the duty of the Attorney-General, or the district or county attorney, under the direction of the Attorney-General, to prosecute for recovery of the same, and the fees of the prosecuting attorney for representing the State in proceedings under this act shall be over and above the fees allowed him under the general fee bill.'

"The thirteenth section of that act reads as follows: 'And in addition to the penalties and forfeitures herein provided for every person violating this act may further be punished by imprisonment in the penitentiary not less than one nor more than ten years.'

"We agree with counsel for appellant that these statutes are penal. They were enacted for the purpose of suppressing and preventing certain things regarded by the Legislature as detrimental to the public interest. The penalties prescribed were intended as punishment, but it does not follow that this is a criminal case within the purview of Article 219 of the Code of Criminal Procedure. After a careful consideration of all their terms, we have reached the conclusion that it was the intention of the Legislature in enacting the two statutes under consideration to create a cause of action in behalf of the State for the pecuniary penalties therein prescribed, to be recovered in a civil suit. We reach this conclusion mainly from the language of the fifth section of the Act of 1899, and the eleventh section of the Act of 1903. These sections declare that those who violate any of the provisions of those acts shall forfeit and pay, in the one instance not less than $200 nor more than $5,000, and in the other instance $50, to be recovered in an action in the name of the State. It is true that in some places in these laws the procedure is designated 'prosecutions,' but in others they are spoken of as 'actions' and 'suits.' In the ninth section of the Act of 1899 it is declared to be the duty of the Attorney-General and district and county attorneys 'to institute and conduct all *suits* begun in the district courts, and upon appeal the Attorney-General shall prosecute said *suits* in the Courts of Civil Appeals and Supreme Court.'

"Section 5 of that act, construed in connection with Section 9, indicates with absolute certainty a legislative purpose to authorize civil suits for the recovery of the pecuniary penalties prescribed. The two sections together indicate that it was not intended that such penalties should be enforced by a criminal proceeding, because if that act creates a criminal offense such offense would be a misdemeanor, of which the district court would have no jurisdiction. The Constitution confers upon that court exclusive jurisdiction of suits by the State for forfeitures and penalties; and it must be presumed that in enacting that statute the Legisla-

ture intended to provide for such suits as were authorized by that provision of the Constitution, and not to create criminal offenses of which the county court alone would have original jurisdiction, otherwise the Legislature would not have used the language, 'shall institute and conduct all suits begun in the district courts.'

"It is true that both of these statutes contain some expressions common to criminal procedure, such as 'offense,' 'guilty,' and 'convicted.' The word 'guilty,' however, is frequently used in civil cases, as 'guilty of fraud,' 'guilty of negligence.' And the word 'offense,' as used in these statutes, has reference to violations of their provisions, and is not equivalent to the words 'felony,' or 'misdemeanor.' However, we do not hold that it is necessary to use either of the latter terms to create a criminal offense; nor, on the other hand, do we think that the words 'offense,' 'guilty' and 'convicted' necessarily determine that these are criminal statutes to be enforced exclusively by indictment or information. The word 'suit' is very generally used to designate a civil case, and seldom, if ever, applies to criminal cases.

"As these statutes do not, in terms, require a resort to criminal procedure for their enforcement, then, even if they do not direct any method of enforcement, we are of the opinion that the State had the right to proceed in a civil action for a recovery of the pecuniary penalties. In such cases it is a well established rule that an action of debt will lie for the recovery of statutory penalties. (5th Ency. Plead. and Prac., 907, and authorities there cited.) It has been so decided in this State in Davidson vs. Missouri Pacific Ry. Co., 3 Texas Court App., 173, where it was held that a suit to recover a statutory penalty was an action of debt, and barred by our statute of limitation, which requires actions for debt, where the indebtedness is not evidenced by a contract in writing, to be commenced within two years. That the State may also bring an action for debt for the recovery of statutory penalties seems to be equally well settled. It was so held by the Supreme Court of the United States in Stockwell vs. United States, 13 Wall., 531. That was an action by the gov-

ernment to recover double the value of certain shingles, alleged to have been illegally imported into the United States. The act of Congress upon which the suit was founded reads as follows: 'That if any person or persons shall receive, conceal or buy any goods, wares or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount of value of the goods, wares or merchandise so received, concealed or purchased.' In that case, among other things, the court said:

> " 'A verdict and judgment having been recovered against the defendants in the court below, the record has been removed into this court and four errors have been assigned.
>
> " 'The first is that a civil action of debt will not lie, at the suit of the United States, to recover the forfeitures or penalties incured under this act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported, for it is conceded that, by the act of importing, an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that when a statute gives a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offense against law it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It can not be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valua-

tion to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The Act of 1823 (3 Stat. at L., 781) fixes the amount of the liability at double the value of the goods received, concealed or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability, is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

" 'But all doubts respecting the matter are set at rest by the fourth section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed and accounted for in the manner prescribed by the Act of March 2, 1799 (1 Stat. at L. 627), entitled "An Act to regulate the collection of duties on imports and tonnage." By referring to the eighty-ninth section of that act, it will be seen that it directs all penalties accruing by any breach of the act, to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector within whose district a forfeiture shall have been incurred is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has been frequently ruled that debt will lie at the suit of the United States to recover the penalties and forfeitures imposed by statutes. U. S. vs. Colt Pet. (C. C.), 145; Jacob vs. U. S., 1 Brock, 520;

U. S. vs. Bougher, 6 McLean, 277; Walsh vs. U. S., 3 Wood. & M., 342; U. S. vs. Lyman, 1 Mass., 482; U. S. vs. Allen, 4 Day, 474. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed or purchased with knowledge that they had been illegally imported, "on conviction thereof." It may be, therefore, that an indictment or information might be sustained. But the question now is whether a civil action can be brought and, in view of the provision that all penalties and forfeitures incurred by force of the act shall "be sued for and recovered" as prescribed by the Act of 1799, we are of the opinion that debt is maintainable. The expression "sued for and recovered" is primarily applicable to civil actions, and not to those of a criminal nature.'

"As to the point made in reference to the penalties being indefinite under the Act of 1899, in addition to the case just cited, we refer to Rockwell vs. The State, 11 Ohio, 130, where the law fixed the penalty at not less than $5 nor more than $50, and the objection referred to was overruled, and it was held that an action of debt would lie. Other courts have held that statutes somewhat similar to those under consideration confer upon the State a cause of action to be maintained in a civil suit (Burgh vs. The State, 118 Ind., 133; Davis Admr. vs. State, 119 Ind., 555; State vs. Grove, 77 Wis., 448; Territory of New Mexico vs. Baca, 2 New Mex., 183). Interesting discussions of the terms 'fines,' 'forfeitures' and 'penalties' will also be found in People vs. Nedrow, 122 Ill., 363; Gosselink vs. Campbell, 4 Iowa, 300.

"Our conclusion is that the statutes under consideration vest in the State a civil right of action for the pecuniary penalties prescribed for violations of the provisions of those statutes. This being true, and as our statute of limitations applicable to civil cases does not include and bar the State, we hold that limitation is not available as a defense in this case. We do not rest this

ruling upon the ground that the statutes under consideration do not create criminal offenses. If it be conceded that they create such offenses, criminal prosecutions for which would be barred within two years, it does not follow that the penalties which might have been recovered by such prosecutions can not, when authorized, be recovered in a civil action. Our Penal Code and Code of Criminal Procedure deal exclusively with criminal cases, and that portion of the latter which deals with the subject of limitation only purports to fix the time within which criminal actions may be commenced; and Article 219, relied on by appellant, merely forbids prosecutions by indictment or information after two years from the commission of the offense.

"It is argued on behalf of appellant that, even though a statute creating an offense may confer upon the State the right to maintain a civil action to recover a pecuniary penalty for violating the statute, still that right would be barred by Article 219, which would bar the right to enforce the penalty by indictment or information. If Article 219, or any other statute, declared that no right of action should exist or no sort of proceeding be instituted for the collection of a penalty after two years, appellant's contention would be correct; but that article is much narrower in its scope and merely prohibits prosecutions in the manner and by the means prescribed for the prosecution of criminal cases. It may be true that the same general result would be sought in the one case as in the other, viz., recovery of the penalty, and, if that were the only thing to be considered, there would be force in the argument that in prohibiting criminal prosecutions after a specified time the Legislature intended thereby to prevent any other character of procedure which had for its purpose the accomplishment of the same general result. If the two proceedings, civil and criminal, were not so essentially different the contention urged might be sustained; but the statutes under consideration apply to natural persons as well as corporations, and as to such person, civil and criminal proceedings are widely different. In a civil action

against an individual to recover a penalty, he is notified of the suit by delivering to him a citation. When the case is tried, if he loses, the only result is a personal judgment against him for a specified sum of money to be collected by execution and not otherwise. But if he is proceeded against criminally for the enforcement of a penalty he is arrested and required to give bond or stay in jail until after the case is tried. Upon trial, if he is convicted, the judgment not only goes against him for the penalty, but, unless he pays it, he is again incarcerated in jail. Thus it will be seen that in a criminal proceeding to enforce the penalty the defendant would necessarily be subjected to the ignominy of an arrest by a public officer; and, upon contingencies which often occur, would be incarcerated in jail. Now when the Legislature prescribed a time which would prevent a prosecution fraught with these serious consequences, does it necessarily follow that it intended to cut off any right the State might have to obtain a personal judgment for a pecuniary penalty, without resorting to a procedure that would bring about any such harsh results? We think not. In prescribing limitation for criminal proceedings we believe the Legislature had in mind cases criminal, both in substance and form, and had no intention of affecting any right the State might assert in a civil action.

"Chief Justice Marshall, in Adams vs. Woods, 2 Cranch., 337, announced that if a law should merely declare that no indictment or information should be presented after a specified time, such law would be pleadable only in bar of indictments or informations, and would not bar a civil action for a recovery of the penalty prescribed for violating a statute.

"An offense which is punishable by imprisonment in the penitentiary, absolutely or in the alternative, is a felony; and as the Anti-trust Act of 1903 fixes confinement in the penitentiary as an alternative punishment, appellant pleaded Article 218 of the Code of Criminal Procedure in bar of the State's right to recover part of the penalties sued for under that act. Article 218 is framed like Article 219, and would apply to a criminal

prosecution based upon the Act of 1903, and bar such prosecution after three years. As we hold that it was the intention of the Legislature to confer upon the State the right to maintain a civil action for the pecuniary penalties therein prescribed, we hold that such right of action is not barred by Article 218. In other words, while the penalties referred to were intended, in a certain sense, as punishment, they were not imposed as punishment to be inflicted through the onerous instrumentalities of a criminal prosecution.

"Appellant also pleaded the statute of limitation of two and four years embodied in the Revised Statutes and applicable to civil cases. It is contended that the two years' statute has application upon the theory that if the State's suit is an action of debt, and not instituted for the preservation of the public rights, revenues or property, then the State should not be exempt from limitation, but should be treated as any other litigant. It is the rule of the common law of England that, unless so expressly enacted, limitation does not run against the sovereign, and that is the rule in the American States. We are not prepared to place upon that rule the restriction urged, but if we should do so it would not be proper to apply it to this case. In seeking to recover the penalties here involved, the State is endeavoring to enforce statutes enacted for the protection of the public interest. One of the main objects of the suit is to protect and preserve public rights and promote a well established public policy.

"In view of what we have already said, it is hardly necessary to add that we regard the four years' statute of limitation as equally unavailing. In Brown vs. Sneed, 77 Texas, 471, which holds that limitation does not apply to the State unless so expressly provided, the authorities are collated and reviewed. We also hold that no error was committed in refusing a charge to the effect that the State must prove its case beyond reasonable doubt. Being a civil case, that rule does not apply.

"4. It is contended on behalf of appellant that the

Anti-trust Act of May 25, 1899, was rendered unconstitutional by the passage of another statute at the same session of the Legislature entitled 'An Act to protect workingmen in the right of organization and the purposes thereof,' approved May 27, 1899, wherein it was provided that from and after its passage it should be lawful for any and all persons engaged in any kind of work or labor, manual or mental, or both, to associate themselves together and form trades unions and other organizations for the purpose of protecting themselves in their personal work, personal labor and personal service in their respective pursuits and employments. By the third section it is declared that that act shall not apply to combinations or associations of capital or capital and persons, natural or artificial, formed for the purposes of limiting the production or consumption of labor's products, or for any other purpose in restraint of trade, and that nothing therein contained shall be held to interfere with the terms and conditions of private contracts with regard to the time of service or other stipulations between employers and employees, and 'that nothing herein contained shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies.' In view of these limitations placed upon that act, we are of the opinion that it was not the intention of the Legislature to authorize anything to be done that was prohibited by the Act of May 25, 1899. Hence we hold that this statute engrafts no exemptions upon the anti-trust statute referred to.

"5. The Anti-trust statute of May 25, 1899, having been superseded and repealed by the Act of March 31, 1903, which diminished the pecuniary penalties, appellant sought to have the latter statute applied to the time before as well as after it went into effect. This was refused, and we think properly so on account of this proviso in the latter act: 'Provided nothing in this act shall be held or construed to affect or destroy any rights of the State of Texas to recover penalties or forfeit charters of domestic corporations, or prohibit for-

eign corporations from doing business in this State, for acts committed before this act took effect.' We are of opinion that this proviso preserved whatever rights the State had under the former law, including the right to enforce the penalties prescribed by that act. We are unable to concur in the proposition that it was merely intended to preserve the right to, but not the amount of the penalties. Nor can we sanction the proposition that because of the location of a comma in the proviso quoted it was the intention of the Legislature to protect and preserve the rights of the State to recover penalties from domestic corporations and not preserve such right as against foreign corporations. No reason existing for making such a marked discrimination, we are not willing to hold that it was the intention of the Legislature to do so, merely because a comma was so used as to render that construction plausible. In construing written laws, courts are not bound by rules of grammar, and may disregard them in order to give effect to manifest legislative intention.

"6. It is claimed that the trial court should have granted appellant's motion for a new trial based upon the ground that the judgment imposes excessive fines, and operates as a deprivation of property without due process of law. It is also contended that the Act of 1899 should be declared void, because it authorizes excessive fines and forfeitures. That question has already been decided against appellant's contention in State vs. Laredo Ice Co., 96 Texas, 467. The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long-continued violations of the law, covering a period of six years. Hence we have reached the conclusion that the verdict is not so large as to render it manifest that the jury were actuated by prejudice or other improper motives.

"7. In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged, the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this State.

The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this State, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the State of Texas; and that, to a large extent, such object has been accomplished. In so far as that agreement related to this State, appellant, acting by its agents, performed it within this State; and such performance within the limits of the State constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been made in this State. To a large extent the case rests upon circumstantial evidence; but we can not say that the jury were not warranted in the conclusions drawn from it. Hence we hold that the verdict is supported by testimony, and no error was committed in overruling the motion for a new trial.

"Upon the whole case our conclusion is that reversible error has not been shown, and, therefore, the judgment will be affirmed.

"Affirmed.

"W. M. KEY,
"*Associate Justice.*

"Filed December 11, 1907."

FURTHER APPEAL.

The judgment of the District Court being affirmed, and a motion for rehearing having been refused, application was made to the Supreme Court of the State of Texas for a writ of error. This application being refused and a motion for a rehearing upon the application being overruled, the defendant Company brought the case to this court upon

writ of error granted by Mr. Justice White, to the Court of Civil Appeals.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

An effort on the part of defendant in error to systematically and logically answer the contention made by plaintiff in error has been necessarily abandoned. The assignments of error which form the basis for the application of the writ of error are so involved in their phraseology that the meaning of a number of them can not be determined. The principle brief of plaintiff in error outlines fourteen "questions in the case." The relation between these "questions" and the assignments can rarely be seen, and the relation of some of them to the case are as difficult of ascertainment. With the aid of the two additional briefs filed it is believed that counsel for defendant in error has determined the contentions made in behalf of plaintiff in error and counter propositions are made on this assumption.

I. *Whether a Federal Question is involved.*
   First Proposition.
II. *Constitutionality of Texas Anti-Trust Statutes.*
   Second Proposition. Not *ex post facto* or retroactive.
   Third Proposition. Equal Protection of Law.
   Fourth. Due Process of Law.
III. *Stock Ownership by Standard Oil Company.*
   Fifth Proposition. Federal Question.
   Sixth Proposition. Unlawful.
IV. *Vagueness and uncertainty of law.*
   Seventh Proposition.
V. *The Penalty.*
   Eighth Proposition. Legislative Power.
   Ninth Proposition. Laws valid.

Tenth Proposition. Penalty Proper.
VI. *Receivership.*

I. NO FEDERAL QUESTION INVOLVED.

First Proposition of Defendant in Error.

No substantial Federal Question requiring the exercise of the jurisdiction of this court is involved in this case.

STATEMENT.

The statement at the beginning of the brief is referred to and the pertinent facts will be mentioned in the argument.

AUTHORITIES.

Arkansas Southern R. R. vs. German Bk., 207 U. S., 275.
Leathe vs. Thomas, 207 U. S., 98.
Stickney vs. Kelly, 209 U. S., 422.
Thomas vs. Iowa, 209 U. S., 263.
Bachtel vs. Wilson, 204 U. S., 36.

ARGUMENT.

The rules which seem to govern this court in determining whether it will exercise jurisdiction, other than by dismissing or affirming in cases of error to State courts are:

The mere assertion that a provision of the laws or constitution has been violated w. not be sufficient; the plaintiff in error must show wherein the constitution or laws have been invoked in a case in which they could have applied and that their protection was refused.

The court must have decided against the claim asserted and if the decision is based upon some other ground the Federal question will not be involved unless there was a palpable evasion of the Federal question.

Where a Federal question was unnecessarily decided, this court will not take jurisdiction.

The following excerpts from opinions of this court will further state the rules.

Thomas vs. Iowa, 209, U. S., 263:

> "Something more than this vague and inferential suggestion of right under the Constitution of the United States must be presented to the State courts to give us the limited authority to review their judgments, which exists under the Constitution and is regulated by section 709 of the Revised Statutes."
>
> See Clarke vs. McDade, 165 U. S., 168.
> Miller vs. Cornwall R. R. Co., 168 U. S., 131.
> Hardy vs. Illinois, 196 U. S., 78.

Bachtel vs. Wilson, 204 U. S., 36.

> "The best that can be said for the plaintiffs in error is that the action of the court was ambiguous. We resolve the ambiguity against the parties complaining, who are bound to clearly show that a Federal right was impaired rather misuse our ingenuity to spell out a Federal question to aid a defense which is merely technical and destitute of substantial merit. It does not appear that the judgment was based upon the decision of any Federal question."

Leathe vs. Thomas, 207 U. S., 98:

> "It is admitted that the general and well settled rule is that in a case coming from a State court this court can consider only Federal questions, and that it can not entertain the case unless the decision was against the plaintiff in error upon those questions. Murdock vs. Memphis, 20 Wall., 590; Sauer vs. New York, 206 U. S., 536. It is further admitted that a

decision upon those questions must have been necessary to the decision of the case, so that if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed as the case may be. Murdock vs. Memphis further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. Eustis vs. Bolles, 150 U. S., 361; Costello vs. McConnico, 168 U. S., 674."

Arkansas Southern R. R. vs. German Bank, 207 U. S., 275:

"According to the well settled doctrine of this court with regard to cases coming from State courts, unless a decision upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed, and even when an erroneous decision upon a Federal question is made a ground, if the judgment is also supported upon another which is adequate by itself and which contains no Federal question the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong."

Applying these rules to the instant case, it does not appear that a Federal question of substantial character and requiring a review by this court of the case is presented.

Most of the assignments of error by plaintiff in error are involved in their construction and uncertain in their meaning. Since, however, no Federal question not presented in the can be considered by the court they are examined with a view of establishing the proposition being argued.

The First Assignment.

By this assignment it is asserted that the Waters-Pierce Oil Company was held responsible for the act of the Standard Oil Company in acquiring the stock of the Waters-Pierce Oil Company before the latter company was organized and that thereby defendant's constitutional rights were invaded.

The assignment misstates the facts, but a minute investigation is rendered unnecessary by the circumstance that the charge of the court and verdict of the jury concerning the matter of stock ownership was eliminated from the case by the Court of Civil Appeals.

No complaint can be made of the act itself based upon the idea that it undertakes to punish for some act committed prior to its passage. No such construction of it is possible. All it purports to do that in any sense approaches the proposition made is to undertake to destroy illegal combinations made before the passage of the act and continuing to operate within the State afterward with certain illegal purposes and certain illegal effects. No person has a vested right in an illegal status and its continuance may be prohibited and punished. A combination effected by stock ownership for the purpose of affecting prices and effecting a monopoly was prior to 1903 illegal so far as interstate commerce was concerned by reason of the Sherman Act, and was so far as Texas business was concerned illegal by virtue of the common law and the act of 1899.

But if that part of the act of 1903 were unconstitutional it would not affect the constitutionality of the remainder of the act, and since the remainder of the act was alone that upon which the Court of Civil Appeals predicated its decision, no Federal question can be pulled into this case by denouncing this immaterial part of the act as unconstitutional.

THE SECOND ASSIGNMENT.

See discussion under assignments one, four and five.

THIRD ASSIGNMENT.

The assignment is with reference to penalties on account of acts done before the passage of the acts. No recoveries were sought with reference thereto.

FOURTH ASSIGNMENT.

The fourth assignment is directed to the assumed error of the trial court in refusing to strike out the portion of the petition of plaintiff which alleges acquisition of stock by the Standard Oil Company.

It is assigned as error upon the ground that "when defendant's permit to do business in Texas was granted on May 31, 1900, it was not competent nor within the legal power of the legislature to interfere with such ownership or divest the Standard Oil Company of its said property, or to make it an offense by the defendant, subjecting it to penalties and a forfeiture of its said permit for such vested ownership to continue, and the said statute is violative of the Constitution of the United States for that it is both *ex post facto* and retroactive in its operation."

As heretofore shown the construction and effect of the act of 1903 in so far as it may affect ownership of Waters-Pierce Oil Company stock by the Standard Oil Company is not involved in the case. The statute did not undertake to effect any vested right of the Standard Oil Company or any other company or punish that or any other company for anything done prior to its passage. It therefore did not impair vested rights and the act was neither retroactive or *ex post facto*. But if the part under consideration had had all these demerits that fact could not here be invoked since the decision appealed from did not deny these claims.

For this same reason the balance of this assignment which invokes the constitutional inhibitions against taking property "without due process of law," against statutes impairing the obligations of contracts, and against *ex post facto* laws, is entirely without merit.

The Fifth Assignment.

The fifth assignment seems to involve the proposition that the plaintiff undertook to hold defendant responsible for the ownership of the stock of the Waters-Pierce prior to the taking effect of the statute of 1899 and that thereby defendant is deprived of property "without due process," that the act "impairs the obligation of contracts," that it is "retroactive," that defendant is denied the "equal protection of the law," and is subjected to all the other constitutional injuries that are suffered by those who have lost because they could find no defense.

It is reiterated that plaintiff's petition did not predicate any violation of its anti-trust statutes of any ownership of stock of the "old" Waters-Pierce Oil Company by the Standard Oil Company or any other corporation. The petition did not predicate any violation of its anti-trust statutes of any act or thing done by the "old" Waters-Pierce Oil Company, or any other corporation prior to May 31, 1900. The proof of acts prior to that date was for the specific limited and lawful purpose of showing a conspiracy and this was following by showing that the conspiracy continued thereafter and that which was done under the conspiracy constituted a violation of the act of 1899. The illegal acts constituting a violation of the act of 1899 was not predicated of stock ownership and was in no sense dependent on it; the charge of the lower court was not predicated thereupon and the judgment of the Court of Civil Appeals was entirely without reference thereto.

Under the act of 1903 an unlawful combination effected by stock ownership was the subject of direct legislation. And it was alleged and proved that contemporaneously with the "readmission" of the defendant into the State and as a part of the plan of "readmission" and for the purpose of effecting an unlawful monopoly the Standard Oil Company acquired a majority of the stock of the "new" company. This affected only a limited and divisible part of the case. The court in its charge submitted this issue and the jury found that upon this issue it was a trust and a monopoly and a member of a conspiracy and combination in restraint of trade and also found that it was also such a trust monopoly, etc., on all the other issues submitted, and assessed the punishment indicated by law for being such monopoly, etc.

The Court of Civil Appeals, as heretofore indicated, sustained its verdict on the other grounds and said that the finding on the stock ownership and the judge's charge thereon were immaterial and predicated its ruling upon other grounds.

Even with the misconception of the petition and the purpose and effect of the evidence appellant has been unable to make an assignment that has the color of a Federal question.

Sixth Assignment.

See discussion under first and fifth assignments.

Seventh Assignment.

This assignment claims that the statutes are too indefinite, vague and uncertain. The question has been determined by the case of National Oil Company vs. State of Texas, 197 U. S.

EIGHTH ASSIGNMENT.

Same as seventh.

NINTH ASSIGNMENT.

This assignment involves the correctness of the court's charge upon the statutes and the sufficiency of the evidence. Neither matter will be considered by the court.

TENTH ASSIGNMENT.

This assignment deals with alleged errors in the trial in the State courts, and presents no question that this court will consider.

ELEVENTH ASSIGNMENT.

This assignment does not claim that any Federal right was violated by the action complained of.

TWELFTH ASSIGNMENT.

This assignment does not claim that any Federal right was violated by the action complained of.

THIRTEENTH ASSIGNMENT.

This assignment refers to paragraph XI of the trial court's charge, expressly excluded from consideration by the opinion of the Court of Civil Appeals.

FOURTEENTH ASSIGNMENT.

Same as thirteenth.

FIFTEENTH ASSIGNMENT.

This assignment is based upon alleged errors in the ad-admission of testimony. The questions presented have been passed upon by the Court of Civil Appeals and Supreme

Court of Texas and they held the rulings proper. There was due process of law and this is not changed by appellant's statement, to the contrary. Besides while these rulings were complained of there was no contention in the court below that their admission constituted the taking of property without due process of law.

Sixteenth, Seventeenth and Eighteenth Assignments.

These assignments are all with reference to the refusal of charges (7th, 8th and 9th) upon the matter of stock ownership by the Standard Oil Co. eliminated from consideration by the Court of Civil Appeals.

Besides there was no claim in any State court that the refusal of these charges constituted a violation of the 14th amendment or any other provision of the constitution of the United States.

Nineteenth Assignment.

This assignment complains of a charge upon evidence refused by the trial court. It was passed upon by all the Texas courts and the refusal held proper. The ruling was correct, but if erroneous it was in accordance with due process of law. Besides there was no suggestion in the State courts that the refusal of the charge violated the 14th amendment or any provision of the constitution of the United States.

Twentieth Assignment.

This assignment complains that the penalties assessed by the jury were so excessive as to constitute the taking of property without due process of law. The penalties were within the limits defined by the law. That the subject matter of the legislation is one completely within the jurisdic-

tion of the legislature has been repeatedly held by this court. It can not be against the Federal constitution for a jury to do that which it was required to do under a law that the State legislature had a right to pass.

Twenty-first Assignment.

This assignment complains of the rulings of the trial court with reference to the application by that court of the Texas laws of limitation. There is a statement that the failure of the Texas courts to depart from the ordinary rule of State exemption from limitation laws and the refusal of the court to apply to cases triable under civil procedure and cases triable under criminal procedure the same rules constitute a denial by the State of "equal protection of the laws." This is another one of those cases indicating how easy it would be to carry all cases to the Federal Courts, if the mere statement that a constitutional right was impaired was equivalent to the existence of a Federal question in the case.

Twenty-second Assignment.

The twenty-second assignment complains of the refusal of the trial court to sustain an exception to a part of plaintiff's petition in which it was alleged that the Standard Oil Company entered into an agreement with the Waters-Pierce Oil Company not to sell any oil in Texas, upon the ground that to punish defendant for such agreement woud constitute violation of the commerce clause of the constitution. The petition distinctly confined its prayer to relief against the continuance of intrastate business carried on contrary to law, and the charge of the trial judge distinctly confined the consideration of the jury to such business. The courts of Texas according to the rulings made in this case believe that when two persons outside of the State of Texas agree to do something in Texas which constitute a violation of

the laws of Texas the fact that the agreement was made out of the State will not prevent the carrying out of the agreement within the State from constituting a violation of the law. Nor does the fact that there is an interstate agreement to violate a State law constitute interstate commerce. The commerce clause of the constitution was not designed to make easy and safe the violation of State laws.

No Federal question is presented by their misstatement by plaintiff in error of the effect of the ruling complained of.

Twenty-third Assignment.

The observations made under twenty-second assignment are applicable.

Twenty-fourth Assignment.

This assignment deals with alleged errors of the trial court. These rulings were made in the trial of the case with defendant objecting or having an opportunity of objecting. They were reviewed by two appellate courts of Texas in the due and orderly manner. The rulings cannot constitute taking property without due process of law.

And if these rulings do constitute the "taking a property without due process of law" appellant has doubtless just discovered that fact, for it was not called to the attention of the court below.

Twenty-fifth, Twenty-sixth, Twenty-seventh and Twenty-eighth Assignments.

These assignments deal with the matter of the appointment of a receiver, a matter which the State court in this case declined to consider upon the ground that it had by the action of appellant been taken up in another appeal. It is manifest in any event that action by a trial court in a re-

ceivership case taken for the conservation of property can not be the basis of a complaint that the property was taken without due process of law.

A review of all the assignments of error have failed to indicate any Federal question of more than a mere shadowy character.

II. CONSTITUTIONALITY OF TEXAS ANTI-TRUST STATUTES.

Of course all of the propositions involve consideration of the constitutionality of these acts, but a number of the propositions may be more conveniently considered under other subjects.

The propositions now considered are:

1st. The acts are not *ex post facto* laws or retroactive.

2d. The acts do not deny the equal protection of the law.

3d. The acts provide due process of law.

In connection with these general propositions the constitutionality of the acts as construed and applied in this case is considered.

SECOND PROPOSITION OF THE DEFENDANT IN ERROR.

Neither the Act of 1899 *nor the Act of* 1903 *is an ex post facto law, nor is either retroactive, nor was either given a retroactive effect in this case.*

STATEMENT.

The trial court submitted to the jury the question only of whether or not under the Act of 1899 the plaintiff in error

had made, entered into or become a party to any illegal agreement or combination on June 1, 1900, or any subsequent date, and whether or not if it did become a party to any such agreement or combination it remained a party to same after the 1st day of June, 1900, and prior to March 31, 1903. (Rec., pp. 288, 289, Sections VII and VIII of charge.)

The trial court submitted to the jury the question only of whether or not under the Act of 1903, the plaintiff in error had made, entered into or become a party to any illegal agreement or combination on March 31, 1903, or any subsequent date, and whether or not it had remained a party to any such illegal agreement or combination after the 31st day of March, 1903, and prior to April 29, 1907. (Rec., pp. 289-291.)

The trial court expressly charged the jury that it could not convict the plaintiff in error for anything done prior to June 1, 1900, under the Act of 1899; and could not convict it for anything done prior to March 31, 1903, under the Act of 1903, and limited and restricted evidence introduced to show anything done prior to those dates.

AUTHORITIES.

Glue Co. vs. Glue Co., 187 U. S., 611.
United States vs. Trans-Missouri Traffic Association, 166 U. S., 290.
United States vs. Joint Traffic Assn., 171 U. S., 505.
Pearsall vs. Great Northern R. R. Co., 161 U. S., 646.
L. & N. Ry. Co. vs. Kentucky, 161 U. S., 677.
State vs. Ins. Co., 94 U. S., 535.
Mugler vs. Kansas, 123 U. S., 668.
Waters-Pierce Oil Co. vs. State, 44 S. W. Rep., 941.
State vs. M. K. & T. Ry. Co., 91 S. W. Rep., 214.
Ford vs. Milk Shippers' Assn., 27 L. R. A., 298.

ARGUMENT.

The acts under consideration prescribe the same penalties for carrying out and maintaining illegal combinations and agreements as for their execution. The effect of the continuance of such a combination or agreement is discussed in the Trans-Missouri Traffic Association case (166 U. S., 290) as follows:

> "It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect. That the contract at the time it was entered into was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act."

Supporting this view is the case of Ford vs. Chicago Milk Shippers' Association, (27 Law. Rep. Ann., page 298) in which it was sought to control the milk output of Chicago by an agreement. It embraced a number of people who furnished milk to the inhabitants of Chicago, and they agreed to form a corporation to which each should sell his milk and that the corporation should then distribute the milk to the customers. After discussing the question of whether or not the acts of the incorporators and shareholders constituted such a violation of law as would subject the corpora-

tion to its penalties and after holding that they were the court proceeded to lay down these propositions:

> "This corporation was organized February 24, 1891, and engaged in business, and the statute invoked by the pleas as a defense became a law July 1, 1891, and the appellee urges that, even if it be admitted that a combination between a corporation and its stockholders exists, such combination, occurring before the passage of the act, can not be held contrary to its provisions, and that the circuit court erred in refusing to uphold propositions presented by appellees which presented this question. The rule is settled that corporations created within this State are amenable to the police power, and such bodies are not beyond legislative control. The corporation is subject to the statute, and, although the contract of guaranty was entered into before the passage of the act, yet, by its terms, the furnishing of the commodity named from month to month was contemplated, and, by the facts as found by the appellate court, that for which the price is sought to be recovered in this case was furnished, after the passage of the act. The acts of the corporation and its stockholders with reference to this sale were within the meaning of the act."

The court applied the law to the contract notwithstanding it was made before the passage of the law.

The police powers of the State can not be in any way affected by the contracts of corporations or individuals. Judge Fisher, in delivering the opinion of the court in the case of Waters-Pierce Oil Co. vs. The State, in 44 S. W. Rep., p. 941, said:

> "In enumerating subjects which may be acted upon by the State in the exercise of its police powers, Mr. Tiedeman, in his valuable work on limitation of police powers (Sec. 96) names combinations in restraint of

trade; and, as said in United States vs. Freight Association, 166 U. S., 'manufacturing or trading companies may also affect prices by joining together, in forming a trust or other combination and by making agreements in restraint of trade or commerce, which, when carried out, affect the interest of the public.' This is certainly a just acknowledgment of the power, for there are few acts which individuals may engage in that are more harmful in their effects upon the interests of the people generally than trusts and combinations concerning the commodities useful to mankind. The rights of the individual must yield to the public wants, and his conduct, and all property held by him, is subject to the control of the State, to the end that he shall so demean himself and use his property with as little hurt and injury to the public as possible. As said in Munn vs. Illinois, 94 U. S., 113: 'While the power does not exist with the whole people to control rights that are purely and exclusively private, the government may require each citizen to so conduct himself and so use his own property as not unnecessarily to injure another.' Mugler vs. Kansas, 123 U. S. This is one of the inherent rights of sovereignty, and it is as much in place that it shall be exercised when the public interest requires as it is the duty of the State, by stringent laws, to protect society from the depredations of the thief and the ravages of the murderer. When it is once admitted that a matter is a subject of police supervision, the expediency and wisdom of the means resorted to are subjects solely confined to the legislative department of the State, subject, however, to limitations imposed by the organic law of the nation in excluding from their jurisdiction, for many purposes, certain matters of control solely reserved to the national government; such, for instance, as many of the matters relating to interstate commerce. It is not meant by this that a Legislature may conclusively declare a matter subject to its police authority, when, in fact, such is not the case, for that is a question which the courts may determine, and, under the guise of that power, by a system of confiscation and spolia-

tion, which has no place in our government, deprive a citizen of his rights; but, as said before, when it is once determined that the subject dealt with really concerns the public welfare, it lies wholly within the police authority of the State, through its lawmakers, to determine how it shall be handled and dealt with. Railway Co. vs. Matthews, 165 U. S. By adequate laws, looking to the suppression of evil, the State, through the exercise of its police power, must necessarily restrain the unbridled license of the citizen in his conduct and use of property; and restraints imposed in this way have never been held to illegally impair his liberty, as is attested from many of the provisions of the Code of this State and others, and the construction that has been given to them. The freedom of speech, the liberty of person and life itself, must be surrendered, when the public interests and the order of good government so requires. The liberty of the citizen, which embraces the legal right to his property and to lawfully contract concerning it, stands upon no higher ground."

The following excerpts from the case of State vs. M. K. & T. Ry. Co., 99 Tex., 527, can be profitably applied to this case.

State vs. M. K. & T. Ry. Co., et al., 99 Tex., at pp. 527 and 528:

"The contract through which this combination was formed was made before the Act of 1903 was passed and the question whether or not there has been a violation of that Act must be determined by inquiring whether or not it applies to such combinations formed before, but carried out after it took effect. The language in which the offense is defined and described requires an affirmative answer. A trust is defined as a combination for certain purposes. Whenever, after the Act begins to operate, such a combination is found to exist it falls within the terms employed. All such combinations are declared by Section 4 to be illegal and are prohibited. This language makes their existence a vio-

lation. The fact that a combination may have been formed before the statute took effect is immaterial if it is in active existence thereafter. The statute has no retroactive or *ex post facto* operation, and applies only to offenses occurring after its enactment; the offense does not consist in the formation and existence of the combination before the law went into operation, but in the persistence of the parties in it after it has become unlawful. This the terms of the Act make reasonably clear when they define the existence of certain elements to constitute a trust, and provide that one of the elements may be the purpose to carry out 'restrictions and the like, and make the penalties provided (Section 11) apply for each day the offense is 'continued.' That such is the correct interpretation of such statutes is held by the Supreme Court of the United States in U. S. vs. Trans-Miss. F. Assn., 166 U. S., 342. But it is said that this interpretation of the statute would render it unconstitutional as impairing the obligation of a valid contract. The answer is that the State may, in the exercise of its police power prohibit the continuance in the future of those things already in existence which are so injurious to the rights and interests of its citizens generally as to justify such an exercise of the power whether the continuance of the things is provided for by contract or not. The same power which may upon sufficient occasion destroy other property of the citizen to secure the general welfare, may, to the same end, destroy the binding obligation of contracts. The constitutional inhibition against the impairment of the obligation of contracts is not a limitation upon the police power when exercised within its legitimate sphere, and therefore the mere objection that an exercise of that power impairs the obligation of a contract does not reach the true question which is whether or not the attempted exercise is within the scope of the power exercised. It is unnecessary in this case to go into any extended examination of the question as to the extent of this power. If we had before us a contract which was originally lawful and reasonable in itself and which, although falling within the literal lan-

guage of the statute, could not justly be regarded as so injurious to the State or its citizens as to afford reasonable grounds for its destruction, a different question would be presented. It is true that there are limitations upon the power of the Legislature to either strike down contracts already made, or unreasonably and arbitrarily to restrict the liberty of citizens in contracting in future, but there is no occasion for applying them here. This contract was, as we have seen, made in the face of a statute then existing, and was not a reasonable, and can hardly be said to have been a lawful one; and it is wholly unnecessary to pursue an inquiry which might arise with reference to contracts of a different character."

The laws were not retroactive, no effort was made to give them a retroactive effect, and no such effect was given them.

Plaintiff charged that many years ago a conspiracy was formed to monopolize the oil business; that this conspiracy continually existed up to the time of the filing of its petition; that from time to time new parties came into the conspiracy, thereby making themselves liable for what had theretofore been done in its accomplishment, and that which was to be done during their continuance. It charged that the Standard Oil Company had been a party to it, and that the old Waters-Pierce Oil Company (called the "Old Waters-Pierce Oil Co." for convenience) had been a party to it and that their agents and officers had been parties to it. The State charged that when the Waters-Pierce Oil Co., after having its permit to do business in Texas cancelled by a judgment of the Texas courts and having that judgment affirmed in this court, in 1900 went through the form of a dissolution and a reorganization, that the Waters-Pierce Oil Company that existed thereafter whether it were the old concern or a new one, was a party to this conspiracy from the date of the new charter to the date of the filing

of the petition. Under the evidence adduced at the trial it is perfectly clear that new company (the expression is used for convenience) could have been held responsible for that which had been done by the old. The putative dissolution and reorganization was merely a device to escape the consequences of a decision of this court so crudely conceived or so insolently executed that it changed neither the name nor the management, nor the capital stock, nor the employers nor the illegal character of its business. But the State did not undertake to hold this defendant responsible for what had been done prior to the date of its present charter, either upon the theory of the joint liability of conspirators or the identity of the Waters-Pierce Oil Company under the original charter and the Waters-Pierce Oil Company under the charter of 1900. No penalties were asked against the defendant for anything that ante-dated its readmission (another word used for convenience) into the State under the charter of 1900. Evidence of what was done before and at the time of the alleged reorganization was admitted to establish the fact of the conspiracy and its character, and evidence was admitted to show that the "new" company took up and carried out the illegal contracts, agreements and understandings of the "old," and that after the reorganization as before there was a complete and perfect conspiracy calculated to produce and producing a practically complete monopoly to which the "new" company was a party. The evidence with reference to what was done before the date of the charter in 1900 was admitted under the strict rules of the criminal laws of Texas, and its purpose and effect was strictly limited by the charge to the legitimate purpose for which it admitted. No effort was made to hold this defendant responsible for what had been done prior to the date of the charter under which it was operating. While it is perfectly true that the Standard Oil Company had a majority of the stock of the "Old" Waters-Pierce Oil Com-

pany and that otherwise there was a combination between them that made them both liable to the laws of Texas, no effort was made in this case to hold them responsible for these violations of law.

In the brief of plaintiff in error this statement is made:

> "The only substantial distinction between the new company and the old one was, that the new company was a different corporation from the old one, and was not affected by the judgment including the latter from Texas, and was not bound by any of the agreements that made the latter obnoxious to the laws of Texas."

The admiration and astonishment occasioned by this charmingly frank avowal should not obscure the proposition that when the new company adopted and acted upon the agreements it became not less obnoxious in its new being than it had been in its former self.

The statement on page 83 of the principal brief of defendant in error that

> "The only agreement upon which the defendant was charged was the agreement made by the Old Waters-Pierce Oil Company in 1878 for a division of territory between it and the Standard Oil Company and there was no evidence of any other,"

shows a lack of knowledge of the case.

While it is apparent from the facts as finally developed in the case that the defendant might have been held for all the acts of the Old Waters-Pierce Oil Co. as well as of all the other conspirators, yet no effort was made to punish it for anything done prior to June 1, 1900. The petition excludes any other idea. The charge of the court specifically defines the purpose and limits the effect of the evidence introduced appertaining to acts prior to May 31, 1900. For

maintaining and carrying out the agreement referred to and making the agreements its own and thereby making a new agreement the State did undertake to hold the defendant. That it was acted upon by both parties after May 31, 1900, is amply indicated by the testimony.

THIRD PROPOSITION OF DEFENDANT IN ERROR.

Neither the Act of 1899 nor the Act of 1903, as construed by the highest State courts of Texas denies to plaintiff in error the equal protection of the law.

STATEMENT.

The Acts of 1899 and 1903, in so far as they affect this case, are set out at the beginning of this brief, and are not here repeated. The opinion of the court construing those Acts is also there set out.

AUTHORITIES.

National Cotton Oil Co. vs. Texas, 197 U. S., 115;
Smiley vs. Kansas, 196 U. S., 447;
Mugler vs. Kansas, 123 U. S., 665;
Gundling vs. Chicago, 177 U. S., 188;
Soon Hing vs. Crowley, 113 U. S., 708;
Nutting vs. Massachusetts, 183 U. S., 553;
Wurts vs. Hoagland, 114 U. S., 615;
Duncan vs. Missouri, 152 U. S., 382;
Eldridge vs. Trezevant, 160 U. S., 469;
Lowe vs. Kansas, 163 U. S., 88;
Missouri Railway Co. vs. Mackey, 127 U. S., 209;
Pacific Express Co. vs. Seibert, 142 U. S., 352;
Powell vs. Pa., 127 U. S., 687;
American Sugar Co. vs. Louisiana, 179 U. S., 95;
Booth vs. Illinois, 184 U. S., 429;
Capital City Drug Co. vs. Ohio, 183 U. S., 246.

ARGUMENT.

As has already been decided by this court in National Cotton Oil Company vs. Texas, *supra*, the Act of 1899, which is involved in this case, is valid and not repugnant to any of the provisions of the Federal Constitution, or any amendment thereto. This court in that case, speaking through Mr. Justice McKenna, says:

> "In Smiley vs. Kansas, decided at this term, 196 U. S., 447, a statute of Kansas is passed on which is identical in effect, and even in words, in all that concerns the present controversy, with the Texas statutes. The statute was assailed as an unwarranted attempt upon the part of the legislature to limit the rights of the individual in the matter of contracting and dealing with his fellow men. The right which Smiley claimed was to combine with certain grain dealers, persons, companies and corporations, who were competitors, to pool and fix the price of grain in the town of Bison, and to prevent competition in the purchase and sale of grain at that place. We followed the ruling of the Supreme Court of the State in holding that the combination was within the prohibition of the statute; we concurred with that court in deciding that the prohibition was a valid exercise of the police power of the State.
>
> "It follows that the statutes of Texas do not deprive the oil company of its property without due process of law.
>
> "We need not consider the statutes referred to" (Act of 1899 and other laws of Texas)" or consider how far this discrimination can exist in view of the decision of the Supreme Court of the State in State of Texas vs. Laredo Ice Company. Granting it can exist, the case at bar is not a criminal prosecution. It involves only the anti-trust laws and their prohibitions and penalties. And in them we have seen by the effect of the Act of 1899 there is no inequality of operation."

It is well settled by this court that the regulation of business or trade is within the police powers of the State, and such regulation may extend to both the exercise and mode of exercise of the business or trade, and although such regulation may more or less restrict liberty or impair the value of property, if it is reasonably calculated to produce the end contemplated, it is constitutional. The only limitation upon such legislation, in so far as it concerns this court, is, that such laws must, in all their requirements operate equally upon all persons affected thereby.

As was said in Lawton vs. Steele, 152 U. S., 143:

> "The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question. (People vs. West, 106 New York, 293), and in such case the legislature may annex to the prohibited act, all the incidents of a criminal offence, including the destruction of property denounced by it as a public nuisance.
>
> "* * * The State may interfere wherever the public interests may demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Like strong expressions are found in Railroad Company vs. Richmond, 96 U. S., 528, and Fatterson vs. Kentucky, 97 U. S., 504.

The case of Wurts vs. Hoagland, *supra*, is authority for the proposition that when laws operate alike upon all persons and property similarly situated, equal protection cannot be said to be denied, and even special legislation is not obnoxious to the Federal Constitution, if all persons subject to it are treated alike under the same circumstances. There are many other cases to the same effect.

As stated, this court has already sustained the Act of 1899 in all of its provisions, and held that it was not repugnant to the Federal Constitution, nor any amendment thereto. The Act of 1903 is not essentially different from that of 1899, except the punishment prescribed in the former was a pecuniary fine of not less than two hundred dollars nor more than five thousand dollars, and forfeiture of charter or permit in case the offender was a corporation, with no imprisonment feature; while the latter prescribes a pecuniary fine of fifty dollars for each offense, forfeiture of charter or permit in case the offender is a corporation, and in addition provides that any person (which would, of course, include any officer or agent of a corporation) violating any of its provisions shall be confined in the penitentiary for a period of not less than one year nor more than ten years. This makes the doing of anything prohibited by the Act a felony punishable as such, with consequent loss of certain rights of citizenship, including the right to vote, to hold office and to testify in court.

It is suggested in some of the briefs on file that the Act of 1899 because of the large penalties that might be assessed under it denies to the plaintiff the equal protection of the law. A sufficient answer to this is that no assignment of error to that effect was filed in this court as the basis for proceedings in error.

But under another proposition defendant in error has shown that the penalties of the Act are lawful and that the penalties assessed against plaintiff in error are proper.

FOURTH PROPOSITION OF DEFENDANT IN ERROR.

Neither the Act of 1899 nor the Act of 1903 deprived plaintiff in error of its property without due process of law.

STATEMENT.

A petition was filed in a court of competent jurisdiction setting out with great particularity the things done by the plaintiff in error, and the laws that it had violated (Rec., pp. 2-43).

An answer was filed by plaintiff in error setting up in great detail its defenses to the State's cause of action (Rec., pp. 43-95).

There was a trial before the court and a jury lasting ten days and a great mass of testimony introduced by both sides, and the jury found the plaintiff in error guilty, and the court entered a judgment in accordance therewith (Rec., pp. 314-315). The case was thereupon carried to the Court of Civil Appeals in the regular way, and after a full hearing and careful consideration by that court, it affirmed the judgment of the trial court (Rec., pp. 1141-1162).

AUTHORITIES:

Simon vs. Craft., 182 U. S., 427;
Remington Paper Company vs. Watson, 173 U. S., 443;
New Orleans Water Works vs. Louisiana, 185 U. S., 336;
Ry. vs. Missouri, 156 U. S., 478;
Iowa Central Ry. Co. vs. Iowa, 160 U. S., 389;
Murray vs. Hoboken Land Co., 18 Howard, 272;
New Orleans Debenture Redemption Co. vs. Louisiana, 180 U. S., 320;
Rothschild vs. Knight, 184 U. S., 334;
Consolidated Rendering Co. vs. Vermont, No. 5, October Term, 1907, Sup. Ct. Rep., p. 178;
Cosmopolitan Club vs. Virginia, 208 U. S., 384;
Caldwell vs. Texas, 137 U. S., 697;
Miller vs. Texas, 153 U. S., 539;
Minder vs. Georgia, 183 U. S., 559.

In the comparatively recent case of Simon vs. Craft, *supra*, this court said:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a State court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity afforded to defend against it. If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the State court as to the regularity, under the State statute, of the practice pursued in the particular case."

Whatever may be said about the case it can not properly be insisted that the trial has not proceeded upon regular and customary and orderly lines. If errors have been committed, that also is not unusual. And all the courts of Texas have been open for their correction. If these courts have not agreed with appellants as to the existence of the errors, that again is not unusual. But in any event, appellant has had its day in court. It presented its defense in the district court. Dissatisfied with the result it asked for a new trial. It appealed to the Court of Civil Appeals; dissatisfied with the result, it asked for a rehearing. It applied for a writ of error to the Supreme Court of Texas; dissatisfied with the refusal it moved for a rehearing. All the avenues of the law have been open to it and have been used by it. It has never been in position to claim that it has not had the advantage of due process of law.

It is true that a claim to that effect is now being asserted or that a pretense to that effect is being made for the purpose of abusing the judiciary of Texas and the people of that State. The tenth "question" suggested by brief for plaintiff in error, signed by Moorfield Storey and J. L. Thorndike, is whether the trial was "so conducted according to the

regular course of judicial proceedings that the judgment can be said to have been obtained by due process of law." In the discussion these several statements appear:

> "It is submitted that the judge wilfully and uniformly disregarded the rules of evidence" (p. 156).
>
> "That the judge arbitrarily and without regard to the rules of law left the case to them with directions intended to mislead them into a conviction of the defendant without evidence."
>
> "It is a matter of common knowledge that the Standard Oil Company is an object of odium in some parts of the country, and it is evident that is the general state of feeling in Texas. The only purpose of all the evidence about the Standard Oil Trust and the Standard Oil Companies and the *old* Waters-Pierce Oil Co. was to establish in the minds of the jury some connection between the Standard Oil Company and the defendant that might have the effect of turning this feeling against defendant. The judge did all he could to assist this purpose, and with complete success."
>
> "It appears by the evidence that was admitted, and by the judge's rulings at the trial, and his directions to the jury, that this was in reckless disregard of the defendant's rights. * * * No consideration was given to the merits of defendant's evidence. The presence of the 'evil eye and unequal hand' is evident throughout the trial."

To say that this language is indecorous is to be mild when severity would be justified. To say that it is untrue is to be weak when strong language is warranted.

So gross an insult has not before been offered the judiciary of Texas. Every ruling of the district judge adverse to plaintiff in error was made the subject of a bill of exceptions and was passed upon and approved by the Court of Civil Appeals, composed of three excellent lawyers, and by the Supreme Court, consisting of three eminent jurists. Every ruling upon the admission or rejection of evidence

adverse to plaintiff in error was the subject of a bill of exception, and was passed upon and approved by both of these courts. The necessarily lengthy charge of the court was dissected and an exception based upon nearly every sentence; the charge was sustained in every respect by all the members of both these courts except that one paragraph held immaterial was not unanimously approved. It is apparent that the members of the highest court in the State and the members of the Court of Civil Appeals for the Third District must share in the criminality of which the trial judge is charged. The trial judge has retired from the bench with spotless reputation; while filling the important judgeship at the State capital, his learning was so universally recognized, his probity so well established, his impartiality so apparent, that in the important litigation between the State and the great corporate interests within the State his court was sought by both parties. All this does not save him from the reckless attacks of an attorney who apparently knows as little about the rules of propriety as about the case he has undertaken to brief.

Upon the merits of the proposition that the manner in which the trial was conducted did not constitute "due process of law," it is enough to say that if that be true the Federal question thus stated was not presented to the Court of Civil Appeals or the Supreme Court, and could not have been passed upon by those courts and can not be passed upon by this court.

STOCK OWNERSHIP BY THE STANDARD OIL CO.

Large parts of the several briefs of defendant in error are devoted to the matter of the ownership of the stock of the Waters-Pierce Oil Co. by the Standard Oil Company. Concerning this matter the following propositions are made:

(1) *If there* was any error in the charge of the trial

court with reference to the matter of stock ownership the error is immaterial, and any Federal question that might have been predicated of it has been eliminated from the case by the action of the Court of Civil Appeals in basing a judgment of affirmance upon other grounds.

(2) The combination effected between the Standard Oil Company and the Waters-Pierce Oil Company by the acquisition of the stock of the latter by the former for the purposes for which the acquisition was made *and with the effect intended,* violated the laws of Texas, and the infliction of penalties therefor would not have given the laws either an extraterritorial effect, or a retroactive effect, or otherwise have violated the Constitution of the United States.

FIFTH PROPOSITION OF DEFENDANT IN ERROR.

If there was any error in the charge of the trial court upon the matter of stock-ownership the error is immaterial, and any Federal question that might have been predicated of it has been eliminated from the case by the action of the Court of Civil Appeals in basing a judgment of affirmance upon other grounds.

STATEMENT.

The charge referred to is paragraph XI of the charge of the trial court, set forth in full at the beginning of this brief. The opinion and judgment of the Court of Civil Appeals may also be there found.

AUTHORITIES:

M. K. & T. Ry. Co. vs. Ferris, 179 U. S., 602;
Hammond vs. Johnson, 142 U. S., 73;
Harrison vs. Morton, 171 U S., 38;
Klinger vs. Missouri, 13 Wall., 257;

Kennard vs. Louisiana, 92 U. S., 480;
Lent vs. Tillson, 140 U. S., 316;
C. B. & Q. R. R. Co. vs. Chicago, 166 U. S., 226;
Glue Co vs. Glue Co., 187 U. S, 611;
United States vs. Trans-Missouri Traffic Assn., 166 U. S., 290;
State vs. M. K. & T. Ry. Co., 91 S. W. Rep., 214;
Baldwin vs. Kansas, 129 U. S., 52.

Herein the action of the Court of Civil Appeals of Texas is alone under review. Plaintiff in error has a standing in this court only as the result of some ruling in that court denying a constitutional right claimed by him.

The judgment of the Court of Civil Appeals was not based upon a holding to the effect that the Waters-Pierce Oil Co. could be held responsible for the ownership of its stock by the Standard Oil Company.

On the contrary, the judgment of the Court of Civil Appeals was distinctly and in so many words based upon other grounds. The petition of plaintiff in this case charges, among other things, that an unlawful combination was effected between the Waters-Pierce Oil Co. and the Standard Oil Co. by the acquisition by the latter company with the consent of the former of the majority of the capital stock of the former, and that this combination (invalid when made) continued after the Act of 1903 went into effect under such circumstances as to make the continuance a violation of that act. The issue there presented by the pleadings was submitted by the trial court to the jury. The jury found that in this respect and in the several other respects in which the Waters-Pierce Oil Company had been charged with becoming a trust and monopoly, and a member of an unlawful combination, that it had become a trust and monopoly and a member of an unlawful combination, and for being such a trust, monopoly and member of an unlawful combination during a certain number of days it

assessed the penalty prescribed by the law. If the jury had found that the Standard Oil Co. did not acquire a majority of the capital stock of the defendant company and thereby form a combination, the continuance of which was a violation of the law of 1903, the judgment would necessarily have been the same, since under the other issues submitted the defendant was found guilty during the period that the Standard Oil Company continued to own a majority of its stock after the law went into effect. For the offense of which the company was convicted the law absolutely fixed a penalty—a penalty that was in no way mitigated or enlarged by the circumstance that the condition which the law prohibited, of being a trust, or monopoly or in an unlawful combination—had been effected in one or many ways. When in the Court of Civil Appeals complaint was made to the effect that with reference to this matter of stock-ownership the charge of the trial court was erroneous, that court held that if there was error it was harmless error, maintained the judgment upon the ground that it was the only judgment that could have been rendered, even with the verdict of the jury upon that issue eliminated, and distinctly announced that its own judgment was without reference to this contention of appellant.

This court will not, of course, go into a consideration of whether or not the Court of Civil Appeals was warranted in its finding that leaving this matter entirely out of consideration there were ample facts to sustain the verdict (Baldwin vs. Kansas, 129 U. S., 52).

SIXTH PROPOSITION OF DEFENDANT IN ERROR.

The combination effected between the Standard Oil Company and the Waters-Pierce Oil Company by the acquisition of the stock of the latter by the former for the purposes for which the acquisition was made and with the effect in-

tended violated the laws of Texas and the infliction of penalties therefor would not have given the laws either an extra-territorial effect, or a retroactive effect, or otherwise have violated the Constitution of the United States.

STATEMENT.

As under last proposition.

AUTHORITIES:

As under last proposition.

ARGUMENT.

The charge made in the petition of plaintiff is that the Standard Oil Company acquired the stock of defendant company in furtherance of a conspiracy set out in detail in the petition. It alleged that the acquisition of this stock was with the knowledge and consent of the defendant. It was alleged that the resulting combination continued with the effect intended of monopolizing the oil business in Texas. The evidence shows that the fixing of stock-ownership by an arrangement in which all the stockholders participated was contemporaneous with the permit of defendant company to do business in Texas, and that it had been made with reference to acquisition of that permit; that by reason of the combination thus accomplished through stock ownership the monopoly in Texas business was maintained, and that thereby prices were fixed. No effort was made to hold defendant responsible for any thing that it did not participate in, though as a conspirator it might have been held for more. No effort was made to hold defendant for the mere acquisition of stock by the Standard Oil Company, though that act was the act of itself and of each of its stockholders. No effort was made to give the law an extra territorial effect, but only for what was done in Texas in consequence of a

conspiracy outside the State. No effort was made to give the law a retroactive effect, but merely to punish the continuance of acts denounced as unlawful.

In one brief filed by plaintiff in error it is said: "Not one shred of evidence can be found in the voluminous record herein to indicate even remotely that of said stock by the Standard Oil Company was with the knowledge or consent of the Waters-Pierce Oil Company, or that such acquisition could in any manner have been prevented by it." The other brief says (p. 105): "There was no evidence that the defendant had any connection with the transaction except in performing the ministerial act of registering the transfer." We are not unfamiliar with the rules of law which maintain the distinction between the corporation and the persons by whom it was formed and who own its stock and control it. The distinction is the basis of many a legal subterfuge and it may be that it saves the quoted statements from being verbally untrue. H. C. Pierce and the Standard Oil Company agreed to incorporate the Waters-Pierce Oil Co. under the charter of May 29, 1900; under the agreement the charter was taken out; thereafter they were the exclusive owners of the stock and the exclusive managers of the company. Not to hold the Waters-Pierce Oil Company responsible for what they did in its name would be to ascribe to the fictions of the law an effect more absurd than is warranted by any adjudicated case. "Waters-Pierce Oil Company" was one of the names under which the oil monopoly conspirators were operating, and under that name, chosen by themselves, and used by them in illegal enterprises, they may be punished.

Plaintiff in error contends:

> "If the holding of stock by the Standard Oil Company of New Jersey in the Waters-Pierce Oil Company of Missouri was unlawful, it was an offense on the

part of the holding company, and not of the company whose stock was so held, the acquisition of which it could neither forbid nor prevent."

As has already been shown neither the holding company nor the company whose stock was held has been injured by the law upon the subject or the application of the law.

The State alleged and proved that the acquisition of the stock and the resulting control was with the knowledge and consent of the defendant. What was done with the knowledge and consent of every stockholder of a corporation is done with the knowledge and consent of the corporation. The only answer to the charge that the company and every stockholder had in view an illegal purpose is the statement that Mr. Pierce expected to absolutely control the concern. This is borne out only by his statement. The evidence shows that there was absolutely no change in the conduct of affairs after the reorganization. Mr. Pierce was merely nominally President. The policy of the company was directed from 26 Broadway. Some of the directors were direct representatives of the Standard Oil people. Later there was not even a pretense that Mr. Pierce had anything to do with the management. Even then, from a legal standpoint, he consented to all that was done. He knew perfectly well that the concern of which he was one of the two stockholders was daily violating the law of the United States and of many States, but chose rather to take his share of the enormous dividends than to appeal to the courts to protect his interest in the corporation from the possible infliction of penalties. A stockholder knowing of the illegal acts of a corporation and accepting the profits of the illegal acts instead of taking steps to prevent will be held to have consented to what was done. At all events the corporation will not be excused from the consequences of these illegal acts because his consent was given merely by acquiescence. The evidence indi-

cates that Mr. Pierce did not consent to his own removal, but that he heartily concurred in the maintenance of the monopoly.

VAGUENESS AND UNCERTAINTY OF THE LAWS.

Seventh Proposition.

Neither the act of 1899 nor that of 1903 is vague, uncertain or indefinite.

STATEMENT.

The acts in question are set out in the statement with which this brief begins.

Authorities.

Swift & Co. vs. United States, 196 U. S., 375.
United States vs. Freight Ass'n., 166 U. S., 325.
Northern Securities Case, 197 U. S., 244.
National Cotton Oil Co. vs. Texas, 197 U. S., 115.
Smiley vs. Kansas, 196 U. S., 474.
State of Texas vs. Laredo Ice Co., 73 S. W. Rep., 952.
M. K. & T. Ry. Co. vs. State, 91 S. W. Rep., 214.
San Antonio Gas Co. vs. State, 54 S. W. Rep., 289.
People vs. Sheldon, 139 New York, 251.
Drake vs. Seibold, 81 Hun., 178.
People vs. North River Refining Company, 121 N. Y., 582.

ARGUMENT.

If the mere assertion to the effect that a statute is "so indefinite, vague and uncertain in its terms that it could not be ascertained by the language used that particular acts constituted an offense," and thereby deprive one of property "without due process of law," can give rise to a Federal

question, then there is no case based upon a statute that can not be brought to the Supreme Court of the United States. And if the uncertainty that may be alleged of a statute can be the basis of Federal jurisdiction, the uncertainty that may be more definitely predicated of the unwritten law will furnish the ground upon which all other cases may come to this court.

If these acts are so definite, so easily construed and applied that it may be said of every conceivable combination of facts that it certainly violates the law or that it certainly does not, then these statutes are better framed than any others that have been promulgated since writing began. Both statutes are about as definite as language may be. The words are of common use and of well established meaning. They are put together with a fair regard for the rules of grammatical construction. The district court, the Court of Civil Appeals and the Supreme Court apparently had no difficulty in understanding them. One of these acts has been before this court; the court evidently had no difficulty in determining its meaning.

The acts under consideration are typical anti-trust statutes. Similar statutes have been in the books of many States. Many cases have been adjudicated. Perhaps in every case questions have arisen as to the meaning and application of the law. Probably it has been insisted in behalf of every combination that it did not come under the terms of the law. There has been a pretty universal difference between the opinion expressed by the law-breakers and the opinion entertained by the courts as to the meaning of these acts. But none of these statutes has been held unconstitutional because of these differences.

The law is a practical thing, and of law makers is not expected a linguistic excellence that can not be attained by others. When an act shall have been passed that conveys definite ideas to ordinary minds and constitutes for them

a sufficient rule of conduct, it is not to be held invalid because some one dissatisfied with its terms can not definitely determine if a scheme he may have for its evasion will fall under its penalties.

Much less is a law to be condemned because a lawyer, trained in the science of quibbling, can demonstrate the vagueness and uncertainty of a law that had so definite a meaning to his client that it had for years been the basis of his conduct. Pierce and the Standard Oil Company and the Waters-Pierce Oil Company may not have understood the laws of Texas, but the careful concealment of their conduct for more than six years indicates that they thought they did.

The Court of Civil Appeals suggests that the Texas statutes against trusts are certainly as definite in their terms as the Sherman Act. That act has not been construed alike by all the members of this court, but this difference of opinion as to its meaning has not been deemed a sufficient reason for holding that judgments under it do not constitute "due process of law." The act has different meanings to the several members of the court, but to each of the members it is the law. And the law is applied even in those cases wherein some of the members of the court agree with the contentions of those to whom the penalties of the law are applied.

This court has not only once but repeatedly placed the stamp of approval upon the Sherman Act, an act much more subject to criticism than either of the Texas statutes. In these decisions the court has recognized the doctrine: "All the authorities agree that in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really *tends* to that end and to deprive the public of the advantages which flow from free competition." 85 Federal, 271.

In the Northern Securities Case, 197 U. S., at page 332, this court, speaking through Mr. Justice Harlan, uses this language:

> "That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination in fact results, or will result, in a total suppression of trade, or in a complete monopoly, but it is only essential to show that by its necessary operation it *tends* to restrain interstate or international trade or commerce, or *tends* to creat a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition."

And again, at page 340, the court quotes from and approves the holding of the Supreme Court of Ohio in the case of Central Ohio Salt Company vs. Guthrie, 35 Ohio St., 666, in which the latter court says:

> "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

In Swift & Co. vs. United States, *supra,* this court, speaking through Mr. Justice Holmes, in considering the Sherman Anti-Trust Act, and a bill filed by the United States against a great many persons and corporations under that law, says, at page 395:

> "The general objection is ged that the bill does not set forth sufficient defini specific facts. This objection is serious, but it seems to us inherent in the nature of the cases. The scheme alleged is so vast

that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are and from their nature must be so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it, notwithstanding these difficulties. * * * * *

"The statute gives this proceeding against combinations in restraint of commerce among the States and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent, for instance, the monopoly, but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Commonwealth vs. Peasler, 177 Massachusetts, 267, 272. But when that intent *and the consequent dangerous probability* exists, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."

In United States vs. Freight Ass'n., 166 U. S., at page 325, this court, speaking through Mr. Justice Peckham, in referring to the Sherman Act, says:

"Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads."

In each of the opinions from which the above quotations were taken, this court uses the very language of the acts of Texas, when they provide that if a contract or combina-

tion or agreement *"tends"* to restrain trade, it is a violation of the law. It is easier to determine when a thing *"tends"* to a monopoly, than to say whether it will produce that result; it is easier to determine what is *"reasonably* calculated" to produce a result, than to foretell a result.

The cases discussed by counsel and relied upon as sustaining their contentions are not authority for the propositions made. In each of the cases cited the defect was that no standard was fixed to determine what were *reasonable rates.* In the case of the Texas statutes we have the standard clearly defined. Agreements, contracts, understandings and combinations are declared illegal when they "fix or regulate the price of any article"; and when this provision is followed in the next paragraph by the prohibition against combinations whereby it is sought to fix or regulate the price of any article, or where the effect of such combination is *reasonably calculated* to fix or regulate the price of any article, we have no uncertainty or vagueness.

The portion of the act of 1903, criticised is sub-division 1, of section 2, which prohibits common management or control of two or more corporations, where such common management or control is brought about for the purpose of producing or where such common management or control *tends* to create a trust as defined in another section of the act. We submit it is much easier to determine when common management and control of two or more corporations *tends* to create a trust, than to determine whether or not they *will* create a trust, or even to determine in ordinary cases the *purpose* of the combination.

There are no such rules of construction as are contended for by counsel for plaintiff in error. If there were such rules no penal statute could be upheld or enforced. When it is provided that if a person "wilfully," "wantonly," "maliciously" or "knowingly" does a thing, he is guilty of

an offense, it leaves to the court or jury to say what these terms mean. Two courts or juries might under the same set of facts arrive at different conclusions as to whether or not an act was wilfully, wantonly, maliciously or knowingly done. Yet it would not be contended that the use of these terms rendered a law doubtful or made it indefinite, vague and uncertain. It is supposed that juries and courts will understand words of ordinary meaning and apply them in the ordinary way, and juries have not had and will not have difficulty in applying to facts the meaning of these laws. As heretofore suggested it is easier to determine whether a thing *"tends"* to restraint of trade or monopoly, than it is to say in advance whether it will produce that result; that it is easier to determine and much more certain of demonstration to say that the making of an agreement or the forming of a combination or the entering into a pool or becoming a party thereto is *"reasonably calculated"* to fix or regulate the price of an article, than it is to say, in advance, that the doing of either of these things will produce this result.

The recognition by this court of the difficulty of determining whether or not a rate is "reasonable" does not carry with it the idea that the word has an occult meaning that places it beyond the comprehension of either the lawbreaker or the jury. The rule of the common law that contracts must not be in "unreasonable" restraint of trade was not practically found difficult of enforcement, and the Sherman Act will not become either unconstitutional or inefficient if it should be finally held that it inhibits only contracts in "unreasonable" restraint of trade.

But if the contention of plaintiff in error that the statutes were vague and uncertain were sound, that fact would not affect this case so far as this court is concerned. As is well settled by this court there must be a Federal question, and that must have been the controlling question. Not only

must the case have been decided in the State court on the Federal question alone, but it must not have been possible to decide it without deciding the Federal question. Applying these rules we find that in so far as the 1903 act is concerned, the Court of Civil Appeals directly and correctly decided that the plaintiff in error had been guilty of other offenses, that did not involve this section of the statute at all, and only one penalty was assessed. In so far as the 1899 act is concerned, the jury found the plaintiff in error guilty of violating another section of the statute, not subject to the criticism made, and assessed a fine of less than one-third the maximum. The verdict of guilty would necessarily have followed from the jury's finding upon the other section and this court is not in position to say that the amount of the penalty was in any way affected by the finding that it was also guilty upon the section criticised.

V. THE PENALTIES.

The ninth "question" presented by the principal brief of plaintiff in error is as follows:

> "The penalties that have been imposed upon the defendant are so excessive as to constitute a deprivation of its property without due process of law."

This and like propositions have been made and lengthily argued in each of the three briefs filed in this case. In order that the contentions thus diffusively presented by plaintiff in error may be somewhat logically met, defendant in error presents in reply the following distinct propositions:

First. The jurisdiction of the Legislature of Texas to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, is absolute and complete.

Second. The jurisdiction of the legislature being complete it may fix such punishment for the violation of a law prohibiting unlawful combinations as it may deem adequate and proper.

Third. The penalties assessed in this case are not excessive.

EIGHTH PROPOSITION OF DEFENDANT IN ERROR.

The jurisdiction of the Legislature of Texas to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, is absolute and complete.

STATEMENT.

For convenience the statement that might properly be made under this proposition is placed at the beginning of this brief.

AUTHORITIES.

Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28.
National Cotton Oil Co. vs. Texas, 197 U. S., 115.
Smiley vs. Kansas, 196 U. S., 447.
Addyston Pipe Co. vs. United States, 175 U. S., 211.
Mugler vs. Kansas, 123 U. S., 665.
Slaughter House Cases, 16 Wall., 63.
Barbier vs. Connolly, 113 U. S., 31.
Carroll vs. Greenwich Insurance Co., 199 U. S., 410.
United States vs. E. C. Knight Co., 156 U. S. 1.
Waters-Pierce Oil Co., vs. State, 44 S. W. Rep., 936.
Anheuser-Busch Brewing Ass'n. vs. Houck, 27 S. W. Rep., 692.
State vs. Laredo Ice Co., 73 S. W. Rep., 952.
Coal Co. vs. Lawson, 34 S. W. Rep., 919.
State vs. M. K. & T. Ry. Co., 91 S. W. Rep., 214.

People vs. Sugar Trust, 121 N. Y., 582.
State vs. Standard Oil Co., 49 Ohio St., 137.
Harding vs. American Glucose Co., 182 Ill., 551.
Arnot vs. Pittson Coal Co., 68 N. Y., 558.

The above decisions, both Federal and State, hold unequivocally that a State has the right, through its legislature, to pass laws prohibiting the making of or carrying out, within the State, agreements or combinations in restraint of trade; that this power was reserved by the several States when the original Constitution of the United States was adopted, and that the only limitation upon the legislature in the exercise of that power and right in so far as the Federal courts are concerned, is that the laws passed in pursuance thereto must not contravene the provisions of the Federal Constitution.

To say that the acts charged to have been committed by the plaintiff in error and for which it was convicted, were matters that a State Legislature had the right to prohibit, is simply saying what this court and many State courts have often said before. Two corporations are combined, it matters not whether by agreement, by common management or by common control, whether by union of their capital or by agreement of their managing officers, or common ownership. The question is, and the Texas statutes make that the test, what is the purpose of the arrangement? Abatement or destruction of competition, limitation of production, if demand declines and prices go down, maintenance or enhancement of prices for articles necessary for public consumption; in short, control of production and prices, control of the market in given lines, and either the destruction of outstanding concerns or their compulsory amalgamation with the combination. The courts have declared such combinations illegal, without reference to anti-trust statutes, so-called. They have widened the basis of

their condemnation by declaring such combinations to be contrary to public policy, because tending to the restraint of trade and competition and encouragement of monopoly, and undue control of production and prices. The courts have said that no matter what the form adopted may be, if the end is to curtail production, enhance prices, restrain trade and competition, control the market in any commodity, it is condemned by the common law, as well as statutes in the different States. The common law, for the avowed purpose of encouraging freedom of trade and production, disabled any corporation from buying out or leasing for long terms the franchises and properties of other corporations. Its design was to keep them all going for the public good.

In the case of Harding vs. American Glucose Company, *supra,* it is held that "any combination of competing corporations, the necessary consequence of which is the controlling of prices, or limiting of production, or suppressing competition, in such a way as to create a monopoly, is contrary to public policy and void. An agreement tending to prevent competition and create a monopoly is void by the principles of the common law, because it is against public policy." The Supreme Court of Texas, in the case of Coal Co. vs. Lawson, *supra,* announced the same doctrine, and held that combinations in restraint of trade were prohibited by the common law. As Texas is a common law State, having adopted the common law by express legislative enactment, long before the first Waters-Pierce Oil Company was ever incorporated or permitted to do business in Texas, the permit was accepted, business done and action taken by the plaintiff in error within the State of Texas, with knowledge of the fact that if it did the things in Texas it was convicted of doing in this case, that it was doing something that was illegal, without reference to the anti-trust statutes. This but emphasizes the point that we are undertaking to make, namely, that there can be no question

but that the Legislature of Texas had complete jurisdiction and authority to say that illegal combinations constituted an offense and crime and provide for their punishment as such, because the common law denounced them as offenses and crimes before any statute was passed doing so.

In the case of Addyston Pipe Co. vs. United States, *supra,* this court lays down a very wholesome rule as to what would constitute restraint of trade and say that when "the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition betwen them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity. Total suppression of trade in the commodity is not necessary to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume of dealing, that is regarded. All the facts and circumstances are to be considered in order to determine the fundamental question, whether the necessary effect is to restrain interstate commerce." This court further holds in that case that in so far as these contracts or combinations affected local or intra-state commerce, only that they were proper subjects of prohibition by State legislatures, and concedes full power of the States over them.

But fortunately it is not necessary for us to argue out all the intricate questions as to how far the State legislature may go in enacting laws upon this subject, because this court in the case of National Cotton Oil Company vs. State, *supra,* had the statutes under discussion that are involved in this case, and held, as they had previously held in Smiley vs. Kansas, *supra,* upon the same character of statute, that not only were contracts, combinations and agreements affecting

commerce or trade within the State a proper subject for State legislation, but that the power had been properly exercised and that the statutes did not contravene any provision of the Federal Constitution.

In the case of National Cotton Oil Co. vs. Texas, *supra*, this court said:

> "It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them. And this concern and the policy based upon it, has not only expression in the Texas statutes, it has expression in the statutes of other States and in a well known national enactment. According to them, competition, not combination, should be the law of trade. If there is evil in this it is accepted as less than that which may result from the unification of interest and the power such unification gives. And that the legislature may so ordain this court has decided." Citing a number of cases.

The completeness with which the principle upheld in that case is established is further indicated by the following excerpts from opinions of this court.

Mr. Justice Holmes, speaking for the court, in the case of Carroll vs. Greenwich Ins. Co., 199 U. S., 410, says:

> "Many State laws which limit the freedom of contract have been sustained by this court, and therefore an objection to this law on the general ground that it limits that freedom cannot be upheld. There is no greater sanctity in the right to combine than in the right to make other contracts. Inded Mr. Dicey, in his recent work on Law and Public Opinion in England during the nineteenth century, indicates that it is out of the very right to make what contracts one chooses, so strenuously advocated by Bentham, that combinations have arisen which restrict the very freedom that Bentham sought to attain, and which even might menace the authority of the State."

And again, in the same case, at page 409, it is said:

> "Whatever may be thought of the policy of such attempts, it cannot be denied in this court, unless some of its decisions are overruled, that statutes prohibiting combinations between possible rivals in trade may be constitutional. The decisions concern not only statutes of the United States, Northern Securities Co. vs. United States, 193 U. S., 197; Swift & Company vs. United States, 196 U. S., 375, but also State laws of similar import. Smiley vs. Kansas, 196 U. S., 447; National Cotton Oil Co. vs. Texas, 197 U. S., 115."

In the case of United States vs. E. C. Knight Co., 156 U. S., at page 11, this court, speaking through the Chief Justice, says:

> "It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by State legislative power."

In the case of Addyston Pipe & Steel Co. vs. United

States, 175 U. S., at page 241, this court, speaking through Mr. Justice Peckham, says:

> "If dealers in any commodity agreed among themselves that any particular territory bounded by State lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be), the character of the agreement would be still more clearly one in restraint of trade."

And again, at page 247, it is said:

> "Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a State, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the State. The combination herein described covers both commerce which is wholly within a State and also that which is interstate."

All of the briefs of plaintiff in error seem to rely upon the recently decided case of *ex parte* Young, 209 U. S., to secure a reversal of the proposition so definitely laid down in the excerpts just copied. Counsel for defendant in error have no inclination to question the correctness of the main proposition in that case—that is that the Minnesota statutes under consideration therein were in conflict with the Fourteenth Amendment. Whatever might be said gener-

ally of the impropriety of courts undertaking to pass upon any question concerning legislation other than to ascertain the meaning of the laws and determine their constitutionality, yet undeniably when the legislature enters the field of business administration and conducts public business or quasi-public business with property that does not belong to the State the owners of the property have a right to appeal to the courts to prevent such administration as will amount to confiscation. Public policy is not involved except so far as it is always involved in the preservation of private rights.

The proposition is frequently made that the Fourteenth Amendment does not interfere with the exercise of the police powers. The only objection to the statement is that it means nothing. As correct a statement would be that the police power authorized such encroachments upon private rights as are not in conflict with the Fourteenth Amendment. If the police power is sufficiently limited by a definition it is not limited at all by the Constitution of the United States. Sometimes it is said that the police power extends to such regulations affecting private rights as are reasonable and necessary. The courts can not determine the desirability or expediency of an act, the good sense or lack of judgment displayed in its passage. It may merely determine whether by reason of conflict with paramount law it is law at all. Very manifestly in those cases where constitutionality is based upon considerations of what is reasonable, the courts exercise a highly important power, and the courts have been more successful in reaching conclusions that are commendable than in stating principles that are satisfactory.

In the relations of the courts to the exercise of the police power by the legislature as to laws and regulations requiring penalties for their enforcement at least three classes have been practically recognized by the courts, viz.:

1st. The laws that deal with the more serious offenses against property and the person.

2d. Those regulations that involve the prohibition of things not abstractly wrong, but which upon account of the general good, can not be permitted.

3d. The laws made to enable the State to control private property devoted to public or quasi-public uses.

With reference to the first of these subjects of legislation no difficulties as to application of constitutional principles arise. As to matters that are the ordinary subjects of criminal codes the Fourteenth Amendment has little opportunity for application. This class includes offenses involving violence to the person, fraudulent or violent infraction of property rights, conduct affecting the public morals. There are no property rights that can stand in the way of complete control of these matters, and assuming an impartial application no question involving the Constitution of the United States can arise with reference to laws concerning them. The cultivated progress of the public conscience may from time to time add to this class something not always assumed to be within it. Lotteries, the liquor traffic, gambling of all kinds, are subjects with reference to which property rights are entirely subordinate, though each of these evils have until recently been able to make claims to legality and each has now defenders denying their moral obliquity. As to this class of cases there can be no claims that prohibitory legislation constitutes the taking of property without due process of law. The second class mentioned deals with the governmental regulation of the conduct of men with the view of compelling such use of every man's property as to make effective the limitation upon which he holds it, that he shall not use it to injury of others.

This class of regulations is peculiarly within the protection of the Constitution. There is much temptation to go

beyond the enforcement of the limitation that there shall be no harmful use of property, and to take without compensation that which, if necessary to the public, should be acquired under the eminent domain. It is with reference to this class of cases that questions of the reasonableness of the exercise of the governmental power has arisen.

The third class of laws involves entirely different principles. Just what will be determined as the limit of the power to declare a business affected with a public use and subject to the power to fix the charges for its service can not be foreseen.

The power has already been exercised with reference to a number of businesses that were not subjected to regulation at the common law. But without reference to the subjects upon which such legislation will operate it is apparent that from the very nature of the legislation somewhat different rules as to the judicial function will have to apply. There are some principles that have been so frequently announced that they may be stated with a fair probability of being correct. The rates of a public service corporation (the rulings have usually been with reference to corporations) may be fixed by the legislature, either directly or by a body substituted for itself. To be valid the rate must be reasonable, by which is meant that it must not be such as to confiscate the property of the corporation.

The rate must not only be reasonable, but the scheme for regulation by the government must provide some plan by which the interested parties (at all events the interested public service corporation) may have that fact judicially determined before subjecting itself to the penalties that might be prescribed for a failure to obey the regulations. The cases discussing the conclusions stated speak of the making of rates as a legislative function, and a determination of whether or not the rate is reasonable as a judicial func-

tion. It may be that these propositions are much more easy to sustain upon precedent than upon principle, but it is certainly quite fortunate that the court has been able to find a way satisfactory to itself to prevent the absurd and frequently disastrous consequences that must necessarily have followed the absolute fixing of rates by the legislature.

Whether or not a rate is reasonable and lawful or unreasonable and confiscatory can be determined only by a consideration of a large number of facts. In the absence of their ascertainment neither the legislature, nor the courts, nor the interested parties can determine if the rates are reasonable. Whether the rate making act is effective or not nobody can know. The property involved belongs neither to the government, nor to the shipper. The government has not chosen to exercise its right to acquire the property under the eminent domain and charge as little as it may please. It has chosen to regulate the property of another and its limited power may or may not have been exceeded. If the public service corporation should perform the service at a rate which proves to be confiscatory it will have had its property taken without due process of law. If it refuses to observe the rate it subjects itself to the possibilities of the penalties. Whenever the legislature passes an act which exposes a person to such possibilities it thereby subjects his property to a burden it ought not to have to bear—takes the property without due process of law. Without this due process of law property may not be taken temporarily or permanently, partially or completely. Upon this ground any rate making act that prescribes any penalties without prescribing a method of testing the reasonableness of the rate prior to their infliction would be unconstitutional.

In the case of a railroad there is absolutely nothing to choose except to submit to the rates made by the government or incur the penalties imposed by the government. The company would not be permitted to take up its railroad

and discontinue its business entirely. It could not refuse to accept and ship freight or transport passengers. An effort to do these things would bring about a forfeiture of its charter and the entire destruction of its property. A law that places a railroad in these predicaments must necessarily be held unconstitutional. But if the case of *ex parte* Young can without difficulty be sustained and probably sustained without reference to the amount of the penalties denounced by the law therein under consideration the effort to use it for authority to overturn the previous decisions of this court as to the laws now before the court must fail. As has heretofore been shown, in the case of *ex parte* Young the court foresaw the very contentions that are now being made and carefully excluded the idea that the penalties of State statutes are ordinarily subject to Federal supervision, or that one may experiment with a statute to see if he may defeat its operation.

> "It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute, at least once for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment, and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having been given) only upon condition that if unsuccessful he must suffer imprisonment and pay fines as

provided in these acts, is in effect to close up all approaches to the courts and thus prevent any hearing upon the question whether the rates as provided by the acts are too low and therefore invalid.

"The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event."

The validity of the statutes which have been violated by the plaintiff in error does not depend upon the existence of a fact which can be determined only after investigation of a very complicated and technical character. It is the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature has been shown to be complete in any event.

The conspirators against the laws of trade through illegal restraint and unlawful combinations have no more standing to conduct experiments with the penal statutes than has the conspirator against the laws of trade through swindling. The legislature has the same complete right to denounce the one and the other.

But plaintiff in error is not even in position to claim that the validity of the law has not been determined and that it has a right to violate the law until he has ascertained definitely that he can be punished for its violation. When it entered the State the anti-trust acts of Texas of 1895 and 1889 had been held constitutional in so far as the cancellation of permits was concerned and the Act of 1903 eliminated the only provision in these acts subject to constitutional attack. And the defendant continued to violate the law of 1899 after it was declared constitutional by the Supreme Court of the United States in the case of National Cotton Oil Co. vs. Texas, 197 U. S., 115. The offense of which

plaintiff in error has been found guilty was committed after the State and Federal courts had declared the rights of Congress and of the States to absolutely prohibit conspiracies in restraint of trade, and the efforts made by it to conceal its conduct and status shows that it was not without an actual knowledge of the applications that had been made of the laws in an effort to suppress a conspiracy of which it had become a part.

Plaintiff is not and never has been under any character of obligation to do business in Texas. It is not a Texas corporation, and it has never owed the State but the one obligation of obeying its law, and this obligation arose only by virtue of its entry into the State to do business. It was under no obligation to enter. If the laws of the State were unsatisfactory it had the complete right to remain out of the State. At the time it entered the State the Act of 1899 was in force. The provisions of that act setting forth the penalties were in no sense ambiguous. It had the right to decline to subject itself to the possibilities of incurring these penalties. The State has not undertaken to administer its property. It has not undertaken to fix any rates. If the State had so undertaken it could have made effective any objection it might have had against the law by simply declining to enter the State. The State has the practically unlimited right to determine the conditions upon which it will permit foreign corporations to do business within her borders. It imposed upon plaintiff in error substantially only one condition: that it should obey her statutes. The only protest the Waters-Pierce Oil Company had any standing to make was by staying out of the State. When it entered it came in with the further understanding that if the State found it advisable in any way to change her law the company would again have the alternatives of obeying, or of getting out.

NINTH PROPOSITION OF DEFENDANT IN ERROR.

Having complete jurisdiction to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, the legislature has the absolute right to prescribe the punishment for a violation of such laws, and the laws under consideration are open to no constitutional objections on account of the penalties.

STATEMENT.

The acts under consideration are set forth in the statement at the beginning of this brief.

AUTHORITIES:

National Cotton Oil Co. vs. Texas, 197 U. S., 115.
Ripley vs. Texas, 193 U. S., 504.
Ohio vs. Lloyd, 194 U. S., 445.
Marion vs. Trout, 199 U. S., 212.
McCray vs. U. S., 195 U. S., 27.
Devine vs. Los Angeles, 202 U. S., 302.
Ry. Co. vs. Hume, 115 U. S., 512.
Tel. Co. vs. Indiana, 165 U. S., 304.
Coffey vs. Haviland Co., 204 U. S., 659.
Ry. Co. vs. Seegers, 207 U. S., 73.
N. W. L. I. Co. vs. Riggs, 203 U. S., 251.
O'Neil vs. Vermont, 144 U. S., 323.

ARGUMENT.

There is no assignment of error by plaintiff in error to the effect that the laws under which the verdict in this case was rendered is unconstitutional upon the ground that it permits excessive penalties and thereby deprives a person of property without due process of law. But the briefs argue the proposition just as if it had been assigned.

There is as has heretofore been shown an absolute right in the legislature to prohibit the things denounced by the anti-trust laws of Texas. This right existing there is absolutely no limit upon its power to fix the punishment except the limitation in the Texas State Constitution that no cruel and unusual punishment shall be inflicted. In the making and the amendment of the Constitution of the United States it was conceived that each State would properly guard against any abuse of power by its own legislatures in this respect, and amendatory action was confined to taking from Congress the power of inflicting such punishments. Limited by this State constitutional provision alone the States have a right to determine the punishment which it shall impose to prevent the doing of those things which it has a right to prohibit.

That conspiracies resulting in monopolies and combinations and contracts in restraint of trade may be prohibited by law has been shown under the next preceding proposition. The effort to use apparently legal methods of procedure to secure unfair advantages in trade and thereby take the property of others without incurring the dangers that inhere in robbery by force, has characterized commerce during the entire time of which we have knowledge. And the resultant evil has been the subject of governmental regulation and punishment. Pretermitting a discussion of earlier efforts to give everybody a chance, a consideration of the laws upon which our laws are principally based will indicate that the efforts now being made to restrain the unlawful use of wealth and the unlawful use of the power to contract and the unlawful use of opportunities to take advantage have prototypes in the crystalized conceptions of justice which constitute the common law, and in the statutes which converted some of these conceptions into written law.

These English common law principles and statutory provisions indicate that at the time these States became free,

at the time the American effort was made to divide the functions of government into legislative, executive and judicial action, the prevention of monopoly was conceived to be one of the proper subjects of legislation. The right to prohibit was then recognized. It was then as clearly and definitely a right of the legislature to prohibit monopoly, to prohibit conspiracies in restraint of trade as it was to prohibit embezzlement, or swindling, or fraud, or highway robbery—all going to the preservation of the property rights of the unsuspecting against the depredations of the unscrupulous.

From the time of the separation of the States from the mother country to a period within the memory of all the members of this court there was little occasion for the exercise of this undoubted right though it is probable that every State had some statute that recognized its existence.

Nearly forty years ago the first effort to completely monopolize the business in a product was begun. Proceeding along the lines of transactions that considered by themselves and without reference to a general plan or conspiracy might not have been unlawful, and along the lines of transactions unpunished because unproved, the Standard Oil Company accomplished a substantially complete monopoly of the oil business and began to draw unto itself much of the most profitable of the other business of the country before there was a realization of the fact that the existing laws were inadequate to deal with so dangerous a situation, When the predatory possibilities of complete monopoly had thus been demonstrated and the inefficiency of the law had thus been shown, the combination and monopolization of the other important businesses of the country began. Taking advantage of the liberal laws of incorporation each set of conspirators could carve themselves into a score of corporations, could place the responsibility where it could be most easily evaded and concentrate the profits where they

were most easily appropriated. Recognizing the fidelity with which conspirators treat each other while each secures from the common fund more than he could obtain by individual action (a principle ordinarily expressed in coarse language) a good English word was prostituted to ignoble uses and the "Trust" was born. Everything was ready now for the monopolization of the monopolies. But the American people awoke to the danger and began to put into more definite words the somewhat indefinite rules of the common law, to adjust the rules of the common law to the complex condition of modern society and to make penal that which had merely been illegal.

More than half the States of the Union passed acts of which the two statutes here under investigation are types, and the Congress of the United States enacted the principles of the common law into the provisions of a penal statute which wisely administered by the executive department and wisely construed by the courts promises to become not less important in the preservation of liberty than the War of Independence was efficacious in its making.

In no one of the State enactments nor in the Federal act, was there merely an effort to regulate the combinations that made for monopoly. If there are "good" trusts and "bad" trusts that fact had no legislative recognition. Each State acted upon the assumption that in so far as its own commerce was concerned it had the absolute power to prohibit, upon the assumption that it ought to prohibit, and upon the assumption that it had the right to fix the punishment for an infraction of the law. The Federal Congress declared its right to absolutely prohibit combinations affecting interstate commerce, absolutely prohibited such combinations and fixed punishment assumed to be sufficient to accomplish the purpose of the act.

Both the State and Federal governments apparently conceived that no regulation of these trusts was possible. The

prohibition was absolute. The experiences since the beginning of the effort have confirmed the necessity for absolute prohibition and have left doubt only as to the sufficiency of the penalties.

Recognition of the impending danger by the legislatures and congress and the resulting legislation came after recognition by the trusts of the financial capabilities of combination. These advantages they had no intention of abandoning and a conflict has resulted in which it is yet to be determined whether the concentrated power of the trusts or the power of the people is the greater. Every device known to the lawless has been used to defeat the will of the people and retain the advantages of unlawful combinations. Unable to prevent legislation and not able always to prevent effort to enforce these acts these trusts have appealed to all those constitutional provisions designed for the protection of human life and liberty in an effort to perpetuate industrial vassalage and retain property unlawfully acquired. Having amassed property by violations of law they hope to retain it by appeals to the law. Having flagrantly and insolently disregarded laws whose penalties were not severe they contend that the infliction of penalties more nearly apportioned to the gravity of the offense constitutes the taking of their property without due process of law.

The laws that have been more recently passed were enacted with a knowledge of the difficulty of their enforcement.

There was recognition of the fact that corporations were principally to be dealt with and that efforts to reach the individuals who were responsible for their conduct presented practical difficulties rendering their personal punishment substantially impossible. There was recognition of the fact that if the monetary penalties were small the trusts could afford to take the chance of their infliction and if they were assessed could afford to pay them for the profits that were

to be derived from violations of the laws. The legislatures have had to deal with an oil trust with a capitalization of a hundred million, with a harvester trust with a capitalization of many millions, with a sugar trust with a capitalization of many millions, with a tobacco trust with a capitalization of many millions, with a beef trust with a capitalization of many millions, with many other trusts with capitalization of many other millions. Under these circumstances small penalties would have encouraged conduct it was the purpose of the legislature to prohibit. But even the naming of comparatively large penalties have not produced the desired results, and the evidence in this case shows that at least one of these trusts continued in its profitable violation of the law, evidently hoping to evade the penalties by concealing its character. The record does not show other violations of the law, but since the court judicially knows that which everybody else knows, it knows that however severe the penalties may be regarded they have not been sufficient to secure compliance with the law.

But in any event it is the province of the legislature to determine the matter of discretion involved in fixing the penalties necessary to enforce laws, and not for the courts to exercise either the power of veto or of correction.

TENTH PROPOSITION OF DEFENDANT IN ERROR.

The penalties assessed by the jury were not excessive.

STATEMENT.

See statement at beginning of brief.

AUTHORITIES.

It is claimed that the penalties are so clearly excessive that their infliction constitutes the taking of property without due

process of law. As has been shown the legislature had a right to prohibit the conspiracies of which defendant has been found guilty, and a right to name the punishment to be inflicted for a violation of the prohibition. The jury as a part of the court trying the case had a right to and did fix the punishment within the terms of the law. The objection was made in the State court that the penalties named by the law and the penalties fixed by the jury constituted cruel and unusual punishment in contravention of the State constitution. The State court passed upon the question thus presented adversely to appellant, and held that the law was not open to that objection. No Federal question based upon the penalties of the law or upon the penalties fixed by the jury has been or can be presented.

But if the question were before the court in a way to require its attention the court would necessarily hold that the punishment is in no sense excessive. Of course no complaint could be made of the provisions which forfeit the charter or cancel the permit of a corporation for violating the law. These results could follow even without specific provision in the law to that effect.

The facts in the case at bar would amply warrant the infliction of the maximum penalties, while the jury awarded less than one-third of that amount. The Court of Civil Appeals in disposing of this case uses this language:

> "The verdict, while large, is much under the maximum permitted by the law. Its magnitude is mainly attributable to appellant's repeated and long continued violations of the law, covering a period of six years."

During this period the character of the operations of the defendant were carefully concealed. It was not until internal dissensions among the conspirators brought about the conditions under which honest men get their dues that the

State had sufficient evidence to warrant the institution of a suit.

The following quotation is from one of the briefs of plaintiff in error:

> "We contend that the action of the court as one of the departments of the State government in sanctioning the act of the prosecuting officers of the State of Texas in delaying this prosecution against the plaintiff in error for nearly seven years and permitting the State to enforce penalties for each day's violation of the laws * * * is a denial to the plaintiff of the protection guaranteed, etc."

That its subtle humor may be appreciated attention is directed to the fact that in September, 1906, Mr. Hadley, the attorney-general of Missouri, had after many futile efforts compelled Mr. Pierce to testify and that in this testimony there was abstracted from him evidence sufficient for the conviction of defendant. Within two weeks from the acquisition of this essential evidence the voluminous petition in this case had been filed, service had been had and the machinery for taking testimony was in operation. Prior to that time the State could do nothing. Conscious of the fact that other oil corporations could not do business within her borders, that her citizens were being furnished with oil the sale of which the laws of other States would not permit, that her citizens were paying more for bad oil than the citizens of other States were paying for good, that she was getting no substantial benefit from the great oil discoveries within her borders, and none from the refineries which had been established, she was yet unable to prove the conspiracy so detrimental to her interests. In the meantime starting in 1900 with a capitalization of $400,000 the property of the Waters-Pierce Oil Company had become worth, according

to the testimony of her president, forty or fifty millions of dollars. In Texas the physical properties had become worth by 1906 at least half a million and the business establishment worth very much more. In addition to this vast increment in wealth, the company had been paying in dividends as much as 700 per cent per annum. The Texas business according to the testimony of officers of the company constituted at least one-third of the business of the corporation. It was doubtless the most profitable business that the company had, for nowhere else was its monopoly so complete. Considering the dividends of seven hundred per cent, and the enormous addition to the value of its assets, the profits could not have been less than five or six millions a year. Of this amount at least one-third, at least one and a half millions, was contributed by the unwilling people of Texas. By the judgment in this case the State will recoup the exactions of only one year out of six. It is easy to see how the defendant could afford to take the chances, and easy to see how notwithstanding the penalties of which it complains it can afford to continue to violate the laws of Texas. It is apparent that while Texas has a right to prohibit the operation of unlawful conspiracies within her borders it has not had the power to prevent the operation, and the penalties prescribed have been inadequate to the ends to be accomplished. Not only does the evidence show that the defendant violated the law, but it shows that it knew it was violating the law, that it kept the fact carefully concealed, and that doubtless realizing the probabilities of ultimate detection it took advantage of the monopoly to do those things the mere possibility of the doing of which is a sufficient justification for the existence of the laws against monopoly. It levied tribute as if it feared each year would be its last. That the application of these remarks may be understood it is to be recalled that the "Old" Waters-Pierce Oil Co. was excluded from Texas by the judgment of the Texas

courts sustained by the judgment of this court. Granted by the State officers after judgment rendered time within which to wind up its affairs and leave the State, upon the day before it was to retire it went through the form of dissolving by a vote of its stockholders. Thereupon another charter was taken out, the stock (except that assigned to dummy directors) being apparently subscribed and paid for by H. Clay Pierce. The concern operating under this new charter is the defendant in this case. The "new" concern was called, as was the "old," the "Waters-Pierce Oil Company"; its capitalization was the same, its property the same, its business organization was the same. No change of any kind was made except that upon some of its stationery the words "incorporated under the Laws of Missouri in 1900," was placed with a rubber stamp and necessity for more careful study of the law was recognized by the substitution of the general attorney of the concern for one of the dummy directors. The fact that nearly two-thirds of the stock of the concern was subscribed in trust for the Standard Oil Company was carefully concealed and the subsequent transfer in blank of the certificates did not appear upon the books of either company. The fact that the Standard Oil Company actually controlled the operations of the company was artfully obscured and the business intercourse between these two branches established by the oil conspiracy was further hidden by having the organization at 26 Broadway, New York, addressed at 75 New Street. The division of territory by which the "Old" Waters-Pierce Oil Company had been freed from competition was maintained, and the old understanding that only the refineries of the oil trust should be patronized was kept in force. All this was done with a circumspection and secrecy not theretofore regarded necessary by a concern never loquacious but always more prodigal of words than of facts. The monopoly which the secret combination maintained was used with

remorseless rapacity. Considered in connection with the chief offenders little will be said of the law other than that its penalties were insufficient and nothing can be said of the verdict of the jury other than to express astonishment at its moderation.

THE RECEIVERSHIP.

The questions presented by the receivership arise in another case in which defendant in error has filed a brief. If it were necessary herein to say anything it would be enough to say that the Court of Civil Appeals declined to pass on any matter connected with the receivership in affirming the judgment attacked in this proceeding in error.

It is respectfully submitted that the case should be dismissed or the judgment affirmed.

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